

Disinheriting Daughters:
Applying Hindu Laws of Inheritance
to the Khoja Muslim Community in Western India,
1847-1937

by

Carissa Hickling

A Thesis Submitted to the Faculty of Graduate Studies
in Partial Fulfillment of the Requirements
for the Degree of

MASTER OF ARTS

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Abstract

In the early nineteenth century, the Khoja Muslim community of Western India had a remarkably syncretic culture and religious life with a unique blend of Hindu, Sunni and Shi'a Islamic traditions. From 1847-1937, the Khojas were distinguished as a distinct community by the British, requiring judicial recognition of their unique customs and practices. The Bombay courts determined that a Khoja 'custom' which disinherited daughters meant that Hindu, not Muslim, laws of inheritance applied to this Muslim sect. The colonial courts' response to claims of disinheriting daughters and other customs fostered a more conservative and restricted understanding of Khoja women's rights of inheritance and control over property than was ever understood by Khoja women themselves. By the late nineteenth century, the discourse both within the courts and by Khoja men reflected a desire to limit women's rights of inheritance even more than that found in Hindu law. The contradictory application of Hindu and Muslim law further disadvantaged Khoja women as it simultaneously denied them rights of inheritance under Muslim law by applying modified Hindu law, yet strictly enforced Muslim law in marital disputes by disallowing Khoja customs which mitigated the more negative consequences for women in unilateral Muslim divorces. How and why the legal position of disinheriting daughters -- and the restricting of Khoja women's rights in general -- was determined, upheld, and debated from 1847 to 1937 is the problem examined in this thesis.

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Many people contributed to this present work. Hussein Keshani sparked my initial interest in the subject. My supervisor, Professor Edward C. Moulton, provided years of encouragement on this journey of knowledge and discovery. The History Department at the University of Manitoba gave considerable latitude to pursue this study. My perspective and understanding grew immeasurably as a result of a year at the Institute of Islamic Studies, McGill University, and a leave of absence to study Hindi as a second language in India.

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My father, Dr. George Gordon Hickling, deserves special acknowledgement. For years he solved my myriad of computer glitches, crashes, and related problems. His help has been key - from finding temporary computers, to providing crucial assistance in every way. So too does my personal cheering band -- Suparna Deb Choudhari, Denise Nuttall, and Tushar Pradhan -- whose messages always bolstered flagging energies.

Finally, I would like to thank my husband, Manav Agarwal. Without his encouragement, patience, understanding, and support, this work would never have been completed.

GLOSSARY¹

- adalat* - law court, from Mughal period adopted by British in early colonial period
agama - a Hindu scripture; used in colonial law for determining descent of property
amil - Mughal officer at the *pargana* (q.v.) level
azwaj - mates; women under the protection of early Muslim leaders, for example, after becoming a captive slave
barbhai - twelve brothers; refers to the Khoja dissident group
bhakti - devotion; the reforming *bhakti* groups in Hinduism stress personal devotion and love as the means of realizing god
chhathi - a ceremony performed approximately six days after the birth of a child
caste - an endogamous social unit that is ranked hierarchically usually associated with particular occupations; membership is by birth
dasoondh - tithe; among the Nizari Khojas it was a religious tithe paid annually to their Imam
da'i - literally 'he who summons'; representative of the *da'wa* (q.v.); a propagandist responsible for spreading the Isma'ili religion and winning converts.
da'wa - literally mission or propaganda; the institution responsible for preaching and propagating the faith
dharmā / dharm - moral duty, religion, law; a Sanskrit term meaning 'that which is right'; also interpreted to refer to charitable or benevolent trusts
dharmashastra - corpus of Hindu law, as composed by Manu, inspired by Vishnu
Diwan - Mughal Imperial treasurer
fatwa - ruling of a religious leader on Islamic doctrine or law
faujdar - Mughal police officer at the district level
fiqh - Islamic jurisprudence; the discipline of elucidating the *shari'a* (q.v.)
ghaibat - concealment; the 12th Shi'a Imam entered in to a period of Lesser Concealment (*Ghaiba Sughra*) from 260 - 329 A.H., after which he became known as the Hidden Imam or the *mahdi* (q.v.)
ginan - from Sanskrit meaning meditative or contemplative knowledge; term used for the corpus of poetical, religious compositions of the Nizari Khojas
guru - spiritual teacher or guide
hadith - a report, or tradition, relating to an action or saying of the Prophet; the corpus of such reports collectively constitute one of the major sources of Islamic law
hajj - pilgrimage (normally meaning to Mecca), one of the five pillars of Islam
hiba - gift, under Muslim law
hijra - literally flight; refers specifically to the flight of early Muslims to Medina
idat - three month period after repeating *talak* (q.v.) three times to obtain a Muslim divorce
ila - a Muslim woman has the right to demand a judicial divorce in the case of a vow by

¹Compiled from Farhad Daftary, *The Isma'ilis: Their History and Doctrines* (New Delhi: Munshiram Manoharlal Publishers with Cambridge University Press, 1990), 558-567; Christine Dobbin, *Urban Leadership in Western India* (Oxford: Oxford University Press, 1972), 286-289; Kenneth W. Jones, *Socio-religious Reform Movements in British India* (Cambridge: Cambridge University Press, 1994); Jan Knappert, *Indian Mythology* (London: Diamond Books, 1995); and H. H. Wilson, *A Glossary of Judicial and Revenue Terms* (London: Wm. H. Allen & Co., 1855; Delhi: Munshiram Manoharlal, 1968).

which the couple abstain from sexual intercourse for a period not less than four months

imam - leader of a group of Muslims in prayer or supreme leader of the Muslim community; title used by various *Shi'a* Muslim sects to refer to the person recognized as the head of their community after the Prophet

Imamate - organizational body which 'rules' the Muslim community with the *Imam* (q.v.) at the head; same as *Khalifa* (q.v.)

inam - faith, one of the five pillars of Islam; also a gift, understood by the colonial courts to be rent-free land (held in hereditary or perpetual occupation), but could be any gift

jama'at - assembly, religious congregation; used by Nizari Isma'ilis of the post-Alamut period in reference to their individual communities

jama'at khana - assembly house; congregation place used by the Nizari Isma'ilis for their religious and community activities

kalima - word; specifically divine word, considered an article of faith (*inam*), one of the five pillars of Islam. The *kalima* is rendered in English with: "There is no God but Allah, and Muhammad is his Messenger (Prophet)"

Kamaria - accountant; assistant to the *Mukhi* (q.v.)

kazi/qadi - a religious judge administering the sacred law of Islam (*shari'a* (q.v.)); under British rule became legal adviser to courts in cases of Muslim law

Khalif - spiritual leader, inheritor of the spiritual leadership from the Prophet Muhammad

Khalifa / Khalifat - head of the Muslim community; same as *Imamate* (q.v.)

khula - dissolution of Muslim marriage by consent of both parties

khwaja - master, in Persian; in India the term became Khoja and denotes an Indian caste consisting mostly of Nizari Isma'ilis

Koran - holy book of Islam

kotwal - Mughal police officer at the town level

lakh - one hundred thousand

madaad-i ma'ash - Mughal grant of land; one having such a grant collected revenues for the Empire; also an assignment of revenue for the support of learned or religious Muslims or benevolent institutions by the government

mahdi - 'guided one'; messiah. The 12th and last *Shi'a Imam* (q.v.) who will return to lead all *Shi'a* Muslims

marz-ul-maut - 'death-illness'; if a Muslim is suffering from a death-illness, s/he cannot dispose of more than one-third of his or her estate; other legal transactions may also be questioned

masjid - mosque

mazahab / madhhab - school; refers to the four Sunni legal schools: Hanafi, Malaki, Shafi and Hanbali

mohar - dower; must be returned to a Muslim woman during the three month period of *idat* (q.v.) before a divorce is valid and the Muslim husband can stop payment of maintenance

mubararaat - dissolution of marriage by mutual consent among Muslims, dissolving partnership.

Mukhi - treasurer or steward; head of a local Indian Nizari community and also

officiated on various occasions in the local *jama'at khana* (q.v.)
mulla - a learned Muslim who leads the faithful in congregational prayer; generally has charge of a mosque and school
nafaqa - maintenance, under Muslim law.
namaz / nimaz - prayer, one of the five pillars of Islam
panchayat - *caste* (q.v.) council; a group of at least five community leaders who decide petty disputes, *caste* matters, and other local problems, most severe punishment is to excommunicate a member
pandit - a learned Brahmin; Hindu priest
pargana - Mughal district, sub-division level
pir - Persian equivalent of the Arabic word *shaikh* in the sense of a spiritual guide, qualified to lead disciples on a mystical path; loosely used in reference to the holders of the highest ranks in the *da'wa* (q.v.) hierarchy of the post-Alamut Nizari Ismailis; also a chief Nizari *da'i* (q.v.) in certain territory, indicating that this individual was the administrative head of the *da'wa* in India
purana - old; refers to a body of Hindu scriptures
purda - veil, screen or curtain; exclusion of women from the gaze of men
qiyama - spiritualization of the *shari'a*, the process by which Imam Hasan II 'ala *Dhikrihi al-Salam* (d. 561/1166) placed divine religious authority in the hands of each new *Imam* (q.v.)
rishtahdar - relations; during the Mughal period wealthier women supported destitute female connections, in imitation of the imperial court
roza - fasting, one of the five pillars of Islam
 Rupees or Rs. - standard silver coin of the British Indian monetary system; in 1835, an East India Company rupee was worth two shillings and one half penny; its value fell by a third from 1874-1892
sas, sasur - mother-in-law, father-in-law
sasural - in-law's home
sat - truth, essence, life
sati - Hindu widow immolation on the funeral pyre of her husband
shakti - female power
shari'a - the divinely revealed sacred law of Islam; the whole body of rules guiding the life of a Muslim
shastra - a Hindu scripture or religious or secular treatise; considered works of authority
shroff - money changer; banker
silsilah - a chain or lineage of spiritual descent, provides the lineage of Imamate authority
smriti - 'What is remembered' Indian oral tradition; refers to the body of remembered Hindu 'law', both ceremonial and legal
sruti - 'What is heard'; applied especially to the Vedas
stridhan - a Hindu woman's property, usually given to her on her marriage
Sufi - Islamic mystiques who seek god directly
sunna - custom, practice; particularly associated with the exemplary life of the Prophet, comprising his deeds, utterances and his unspoken approval; it is embodied in *hadith* (q.v.)
talak - 'I divorce thee', repitition of *talak* three times before four witnesses is a declaration of intention to divorce
tantra - ritual, rule; refers specifically to magical, esoteric and mystical rituals of

worshippers of Shiva and Shakti; also in Mahayana Buddhism
taqiya - precautionary dissimulation of one's true beliefs, especially in times of danger
thakur - master; landlord, village head man
tumans- form of currency, used in the late 18th century between India and Persia
ulema - learned men, a scholar of Islamic religion
vakil - a pleader or lawyer
vyavasthas - settlement, arrangement; a written opinion on points of law with citation of the original texts on which it is based, given by Hindu *pandits* (q.v.)
wakf - Muslim endowment
wasi - legatee, executor of a will; also the immediate successor to a prophet and in this function responsible to interpret and explain the messages from the prophets; the *Imam's* representative
wazir/vizier - minister; high officer of the state
zahir - a Muslim form of inchoate divorce; also the outward, apparent, or literal meaning of sacred Muslim texts and religious prescriptions, notably the *Koran* (q.v.) and the *shari'a* (q.v.)
zakat - alms giving, one of the five pillars of Islam
zamindar - landholder; control of the land and responsibility for payment of assessed revenue to the government, primarily in Bengal
zamindari - the act of controlling land (*zamin*) or duties of a *zamindar* (q.v.)

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Chapter One

Introduction

Chapter One

INTRODUCTION

Problem

In the nineteenth century, the Khoja Isma'ili community of Western India had a remarkably syncretic culture and religious life with a blend of Hindu, Sunni and Shi'a Islamic traditions. This Muslim sect had originally been converted by Isma'ili missionaries from Hinduism in the twelfth century. Khoja beliefs and customs were a puzzle for the British colonial legal system and the Khoja's spiritual leader, Imam Mohammad Hussein Husseini. Husseini was a Persian nobleman most commonly known today by his title Aga Khan I. Struggles over leadership of the community between the Aga Khan and a small but influential group of reform oriented families, the *barbhai*, erupted into controversies which could not be contained within the community's own decision making body, the *jama'at khana*. Instead, the colonial courts were drawn into challenges over such issues as Khoja succession and inheritance, ownership of community property and even problems of Khoja religious identity. Specifically, the issue of Khoja female inheritance provides a unique case study of both a community in transition and the implications of decisions rendered in the colonial courts.

One ideological justification used by some British to support their presence in India was the superior treatment of women in a civilized England versus the subordination of women in a perceived backward India. As a result, such issues as widow immolation (*sati*), female infanticide, and child marriage attracted the attention of colonial authorities.¹ The colonial courts became engaged in a wide range of issues from the regulation of female

¹ Nationalist social reformers were vigorously involved in protesting, challenging and informing debates and policy surrounding these and numerous other issues. To suggest that the British were solely responsible for attention to and action regarding such issues, through the government and judiciary, is an extreme exaggeration and oversimplification. Numerous studies have been concerned with socio-religious reform movements in India which tackled these issues. More recently a number of studies have dealt specifically with the gender implications of reform. See Kenneth W. Jones Socio-religious Reform Movements in British India (Delhi: Cambridge University Press, 1994). Others seek to go beyond both the colonial and patriarchal nationalist discourse on women's reform issues. See Nita Kumar, ed., Women as Subjects. South Asian Histories (Delhi: Stree, 1994). See also Kumkum Sangari and Sudesh Vaid, eds., Recasting Women. Essays in Indian Colonial History (Delhi: Kali for Women, 1989). Related essays can be found in: J. Krishnamurty, ed., Women in Colonial India. Essays on Survival, Work and the State (Delhi: Oxford University Press, 1989).

sexuality to the definition of their rights to inheritance and use of property.² A closer examination of the latter issue -- a woman's right to inherit property and her ability to exercise management over it -- clearly demonstrated the patriarchal bias of the colonial courts which tended to undermine, rather than protect or expand, women's rights in these matters.³ Hence, far from providing an 'enlightened example' and aiding in the "cause of female emancipation and progress," the colonial courts frequently performed the opposite function with regards to the position of women in Indian society.⁴ The case of Khoja female inheritance, as we will see, bears witness to this assertion.

In 1847 two cases came before the Bombay Supreme Court in which two female Khoja cousins sued for a portion of their fathers' estates. They were supported by their spiritual leader, the Aga Khan, through his brother, who argued in favour of their inheritance rights under Muslim law. On the other side stood the cousins' step-mothers and the dissenting faction, the *barbhai*, who claimed that the Khoja community followed a different 'custom' of inheritance, one which most closely resembled Hindu law. The judge, Sir Erskine Perry, stated that while sympathetic to these women, he felt it was his duty to disinherit the daughters as he was convinced this was the 'custom' of the community and, since it was not inconsistent with British law, the custom must therefore be upheld. Thus two ideologies of British rule came in conflict: British supremacy as a 'civilizing' influence and British policy of a perceived position of 'non-interference' in the personal legal 'customs' of the peoples they ruled.

The role of the British Indian courts in determining and enforcing a 'custom' of disinheriting daughters created a legal precedent that placed the Khoja community under the British interpretation of Hindu laws of inheritance for nearly one hundred years. An irony is that the women of the Khoja community, as compared with other Muslim communities in Bombay, appeared to have considerable freedom, mobility, and a marked lack of restrictions

²See Janaki Nair, Women and Law in Colonial India (New Delhi: Kali for Women, 1996) for an introduction to and overview of these issues.

³The myth that the British Indian legal system was liberal, progressive and performed an emancipatory role for the women of India largely remains entrenched in most literature. It is being challenged though, and an interesting example of this is found in: Sudhir Chandra, "Whose Laws?: Notes on a legitimising myth of the colonial Indian state" Studies in History 8, 2 (1992), 187-211.

⁴Indu Prakash (14, March 1887) as quoted in Chandra, "Whose Laws?" 209, fn 43.

imposed on them. Their elevated position in society contrasted with their increasingly more and more restricted legal status, particularly in matters of inheritance, as enforced in the colonial courts from 1847-1937.

As a review of the relevant literature will clearly demonstrate, the entire issue of women's rights of inheritance in the Khoja community has been inadequately examined. Specifically, no author has traced the development of the special legal status of Khoja inheritance over a hundred year period. No effort has been made to fully understand the 1847 Khoja Female Inheritance cases and no attention has been paid to all of the subsequent cases dealing with Khoja women and inheritance. The debates over a proposed Bill for the Regulation of Khoja Succession and Inheritance have been virtually ignored by scholars and have received little attention beyond the most cursory mention in previous studies. Scholars who have researched issues pertaining to the Khoja community have tended to focus on debates over authority and leadership rather than the domestic or internal community dynamic surrounding inheritance and personal laws.⁵ The reasons for seeking judgements in the colonial courts on women's rights of inheritance and the impact of the various decisions on the legal position of Khoja women are, therefore, significant subjects which need to be critically explored. How and why the legal position of disinheriting daughters -- and the restricting of Khoja women's rights in general -- was determined, upheld, and debated from 1847 to 1937 is the problem to be examined in this thesis.

Method and Outline

The thesis follows a predominantly chronological order and is based on primary documents and secondary sources. This chapter introduces the main themes explored in the thesis and reviews previous work in the field.

Chapter two provides the background and context of the thesis. It outlines the accepted religious lineage of the Aga Khani Qasim-Shahi Nizari Ism'aili Shi'a sect of Islam.

⁵This assertion is based on both a review of secondary literature and the records kept by the National Archive of India on scholar's consultation of papers relating to the Khoja community. The majority of the records from the NAI were not, prior to my research in 1996, ever examined. However, as a significant number of papers were unavailable or too brittle to be consulted, this cannot be definitively asserted. By contrast, the MSA records have been consulted by Dr. Masselos and by a recent Chicago PhD student Amrita Shodhan. However neither was concerned with women's inheritance issues and their published research reflects their interests in issues of community and identity, as I have asserted above.

The particular and specific form of Islam adopted by the Khoja community, their conversion, and how their history and religion were perceived by the colonial courts helps explain their ambiguous religious identity and position in Indian society. The transfer of the Imamate from Persia to India in 1843-1848⁶ proved to be a pivotal event in the history of the Khojas and all Isma'ilis. An overview of the Imam's family history and Khoja community events during the nineteenth century also provides the social and political backdrop of the court dramas.

Chapter three begins with an introduction to the development of the colonial legal system under which the 1847 Khoja Female Inheritance cases were heard. The case, its participants and issues are examined. How the controversy developed and positions were taken by the parties involved is explored with reference to the testimony and judgement contained in court documentation and newspaper reports. The issue of whose authority was binding on family matters is also considered and the legal dimensions of the case are noted in the judgement. Despite the decision of the Aga Khan and the majority of the Bombay *jama'at khana* to excommunicate the dissenting faction, a binding legal precedent was firmly established by the 1847 ruling.

The fourth chapter investigates the aftermath of the 1847 cases and argues that the precedent in this decision set the stage for increasingly more conservative rulings. It does this by reviewing cases such as *Gangbai v. Thavar Mulla*, *In the goods of Mulbai*, *Hirbai v. Gorbai*, and *Rahimatbai v. Hirbai*, all of which continued to apply Hindu law in disputes over Khoja women and inheritance.⁷ Invariably, daughters were denied all rights of inheritance. These cases all serve to illustrate how the legal status of Khoja women was shaped, despite their relatively strong and elevated position in Khoja society as compared to other Muslim sects.

The fifth chapter notes new challenges to the application of Hindu law in matters of inheritance. During this period, more and more Khojas left wills with instructions for the provision of annuities or 'gifts' for their dependants, some of which closely mirrored Islamic

⁶While the Aga Khan first entered the region in 1843, it was not until 1848 that the headquarters of the Imamate was established in India.

⁷*Gangbai v Thavar Mulla* (1863) 1 Bombay High Court Reports 71; *In the goods of Mulbai* (1866) 2 Bombay High Court Reports 276; *Hirbai v. Gorbai* (1875) Bombay High Court Reports 294; *Rahimutbai v. Hirbai* (1877) 3 Indian Law Reports, Bombay Series 34.

norms. Disputes over these 'gifts' demonstrated how both Khojas and the courts responded to these wills. The chapter also explores how women and their rights were disadvantaged by the contradictory application of both Hindu and Muslim law. Despite assertions of the existence of Khoja customs which ameliorated the treatment of Khoja women in divorce, the court chose instead to strictly apply Muslim law in disputes over marriage and divorce. The result was that Khoja women could be unilaterally divorced with no right to maintenance. As a consequence of such a rigid position, an attempt was made to deny a widow's right to maintenance, as provided under Hindu law.⁸ Maintenance was a very real problem for Khoja women, and the chapter concludes with a discussion of the relationship between inadequate maintenance and widow remarriage.

The sixth chapter begins with an examination of the 1878-1885 Khoja Law Commission, based on a process used to create separate legislation for the Parsi community.⁹ The proposed Khoja Bill was intended to resolve disputes over inheritance which continued to erupt into both battles in the court and violence within the community. The debates exposed how the various parties viewed the problem of women's inheritance and more importantly reflected the motivation behind their positions. The chapter then explores how the Kutchi Memon community gained the right to choose to be governed by Muslim laws of inheritance and succession. With the introduction of the 1937 Shariat Act, the application of Hindu law to Muslim sects was overturned. The legal ramifications for the Khoja and Memon communities are briefly noted.

The final chapter concludes the thesis, answers the problem of why daughters were disinherited, and examines the overall limitations imposed by the courts on Khoja women's rights of inheritance. The impact of access to the courts as an alternative decision making authority, and the cases themselves, are examined in light of the controversies within the Khoja community and challenges to the Bombay *jama'at khana* and the leadership of the

⁸For divorce the following cases are considered. *In re Kasam Pirbhai and his wife Hirbai* (1871) 8 Bombay High Court Reports, 95 and *Suleman Varsi v. Sakinabai* (1899) 1 Bombay Law Reporter 346. Maintenance of a widow is dealt with in *Rashid Karmalli v. Sherbanoo* (1904) 29 Indian Law Reports, Bombay Series 85 and subsequent related cases.

⁹See Christine Dobbin, Urban Leadership in Western India. Politics and Communities in Bombay City 1840-1885 (Oxford: Oxford University Press, 1972) and chapter four of Jesse S. Palsetia, "A Social History of the Parsis: Preservation of Identity in Bombay City, 1787-1918" (PhD dissertation, University of Toronto, 1996). Mary Boyce, Zoroastrians. Their Religious Beliefs and Practices (New York: Routledge & Kegan Paul Inc., 1987) provides a basic introduction to Zoroastrians and the Parsi community in India.

Aga Khans. The impact of these cases on the colonial legal system is also examined and comparisons are drawn to women's inheritance in other Islamic sects. In conclusion, the thesis aims to provide a significant contribution to the further understanding of not only the circumstances of this particular Muslim sect, but the overall treatment of women in the colonial legal system in nineteenth and early twentieth century India.

Previous Work in the Field

Previous research related to this topic falls under two broad categories: Isma'ili history, religion and communities, such as the Khojas, and British - Indian legal history and law, including recent works concerned specifically with the treatment of women. There are several bibliographical guides which provide an introduction to the kinds of primary and secondary sources available on Isma'ili religious literature, spiritual leaders, and other aspects of Isma'ili history and philosophy. Some of the works dealing with Isma'ili history and religion focus on Isma'ilis in India and more specifically, the Khoja community, due to their prominence and financial position in the late nineteenth and twentieth century. However, the majority of publications on Isma'ilis are dominated by studies of the Aga Khans and their families. Legal works include: British-Indian legal history, guides to Anglo-Indian Muslim and Hindu law, and articles which examine Muslim sectarian groups which either had special legal positions defined as they were covered under Hindu law, or had demonstrated a 'custom' that placed them outside of both Hindu and Muslim law. More recently, a body of gender specific studies has emerged, including works with poststructuralist and feminist theoretical leanings that are concerned with the impact of the colonial legal system on women's history and position in Indian society.

Bibliographies

Research and publication on the Isma'ilis has increased significantly over the past several decades. By far the most comprehensive and useful bibliography compiled on Isma'ili books, articles, thesies, translated *ginans*, speeches and interviews by the Aga Khans in European languages is that by Nagib Tajdin.¹⁰ Much of the bibliography stemmed

¹⁰Nagib Tajdin, A Bibliography of Ismailism (Delmar, New York: Caravan Books, 1985).

from Tajdin's own collection and his extensive research on Isma'ili history and philosophy.¹¹ Tajdin's work is built upon his predecessors, however many of the sources indicated in previous bibliographies are held in private collections and predicated on an assumption that the researcher can work competently in languages such as Arabic, Persian, Gujarati, Sindhi, Khojki.¹²

Isma'ili History and Religion

The Khoja community of western India were considered by both their spiritual leader and by the colonial courts, after the 1866 Aga Khan case, to be members of a particular Islamic sect known as the Isma'ilis. More details regarding the origin and history of this sect will be provided in the next chapter, but in terms of literature on the community, it is important to recognize that as a historically marginalized Muslim group, the majority of works on Islam, Islamic law and Indian Muslims, including those concerned with Muslim women, virtually ignore the presence of such sects. That the Bombay law courts recognized Isma'ilis and Khojas specifically as unique, is a situation which will also be examined in this thesis.

¹¹Tajdin wrote his Bibliography in Montreal at a time when, thanks to funding from the Aga Khan Foundation, there were close ties between the Institute of Islamic Studies at McGill University and the Institute of Isma'ili Studies in London. This relationship was dissolved prior to my time at the Institute in 1992-1993 and all that remained were earlier dissertations and a small, but significant, collection of books on Isma'ili history in the Institute's library.

¹²As Tajdin points out in his introduction, the majority of the titles cited in many of these bibliographies were "held in private collections and not accessible to the public." Tajdin, A Bibliography of Ismailism, 9. Other Bibliographies include works by Fyzee, Ivanow, Goriawala, and Poowala listed here. Asaf A. A. Fyzee, "Materials for an Ismaili Bibliography: 1920-1934" Journal of the Bombay Branch of the Royal Asiatic Society N.S. 11 (1935), 59-65; Asaf A. A. Fyzee, "Materials for an Ismaili Bibliography: 1936-1938" Journal of the Bombay Branch of the Royal Asiatic Society N.S. 16 (1940), 99-104; Asaf A. A. Fyzee, "Short Notes. Additional Notes for an Isma'ili Bibliography" Journal of the Bombay Branch of the Royal Asiatic Society N.S. 12 (1936), 49-62; Asaf A. A. Fyzee, "A Collection of Fatimid Manuscripts" In Comparative Librarianship: Essays in honour of D. M. Marshal (1973), 209-220. Wladimir Ivanow, A Guide to Ismaili Literature (London, 1933); Wladimir Ivanow, Ismaili Literature: A Bibliographic Survey (Tehran: Ismaili Society Series, 1963). Mu'izz Goriawala, A Descriptive Catalogue of the Fyzee Collection of Ismaili Manuscripts (Bombay, University of Bombay Press, 1965). Ismail K. Poonwala, Bibliography of Khojki Manuscripts in the Collection of the Ismailia Association for Pakistan (Karachi: Ismailia Association for Pakistan, 1971). Other bibliographies inaccessible for this study include: Louis Massignon, Esquisse d'une bibliographie qarmate (1922) and Mahmud b. Mahdi at-Tabrizi, Fi Ta'rikh-i Firqati'l Aghakhaniya wa'l-Bohra (1932), referred to in Tajdin's Bibliography on page 9. For the Bohra community, Hussein F. al-Hamdani's "Some Unknown Isma'ili Authors and their Works" Journal of the Royal Asiatic Society (1933), 359-378, provides an adequate starting point.

Colonial lawyers and judges consulted literature which, during the nineteenth century, identified Isma'ilis as the Muslim group known during the period of the crusades as Assassins. The literature was replete with lurid details on the Assassins' mystical powers, their rampant use of hashish, the fanaticism with which they followed their leader, and most of all their notorious political assassinations. Such legendary figures as the 'Old Man of the Mountain,' leader of the Assassins, were prominent in medieval European literature and Orientalist historiography and were linked in the contemporary context with the Aga Khan.¹³ A reflection of this preoccupation is demonstrated in an article by Sir Bartle Frere in 1876 on the Khojas and their leader, with its wholesale acceptance of a hodge podge of information from the 1866 Aga Khan case and sensational images of the Khoja leader's Isma'ili history and heritage.¹⁴

Works cited in the 1866 Aga Khan case were indicative of the materials consulted by the court. They included Gibbon's Decline and Fall of the Roman Empire, Ockley's History of the Saracens, De Stacy's Exposé de la Religion des Druzes¹⁵ and Hammer-Purgstall's History of the Assassins. Gibbon's work was largely based on a 1751 book by M. Falconnet entitled Dissertation sur les Assassins.¹⁶ Gibbon's attitude towards the Isma'ilis was clearly demonstrated by his derision of the so-called 'Assassins' as "odious sectaries."¹⁷ De Stacy's work was considered to be more comprehensive but when Joseph Von Hammer-Purgstall's The History of the Assassins was translated into English in 1835, it became *the* authority on Isma'ilis accepted in the Anglo-Indian courts.¹⁸ Yet Purgstall's work is full of

¹³For a discussion of the treatment of the Assassins in medieval Western literature see C. E. Nodwell, "The Old Man of the Mountain" Speculum 22 (1947), 497-519.

¹⁴Sir H. Bartle E. Frere, "The Khojas: The Disciples of the Old Man of the Mountain" MacMillans Magazine, 34 (1876), 342-350, 430-438.

¹⁵Gibbon Decline and Fall of the Empire (1776-88); Simon Ockley, History of the Saracens: Comprising the Lives of Mohammed and his Successors, to the death of Abdalmerlik, the Eleventh Caliph with an account of Their Most Remarkable Battles, Sieges, Revolts, &c. Collected from Authentic Sources, Especially Arabic Mss 5th ed. (London: Henry G. Bohn, 1848); Silvestre De Stacy Exposé de la Religion des Druzes (Paris, 1838).

¹⁶Falconnet was not considered an 'orientalist' by such scholars as the French orientalist, Silvestre De Stacy, as his work was based on largely European medieval sources. De Stacy, instead, consulted a number of Arabic manuscripts held in a collection at the Paris Bibliothèque Nationale. Edward Burman, The Assassins. Holy Killers of Islam (London: Crucible, 1987), 148.

¹⁷As quoted in Burman, The Assassins, 147.

¹⁸Joseph Freiherr Von Hammer-Purgstall, The History of the Assassins Derived from Oriental Sources, Trans. Oswald Charles Wood (New York: B. Franklin, 1968). His work on the Isma'ilis first appeared in 1818 in Stuttgart under the title Geschichte der Assassinen, and was later published in London in

vitriolic diatribes against Isma'ili religious doctrines and activities, a highly biased account based largely on medieval European sources and Arabic sources from Muslim communities politically opposed to and religiously dismissive of Isma'ilis. From Von Hammer-Purgstall's and these other works, a number of assumptions, presumptions, and misapprehensions regarding the community were formed. Judges and lawyers of the early to mid-nineteenth century used such sources to draw conclusions about Isma'ili history, contemporary Isma'ilis, and as the basis for presuppositions on how the Khoja community should be treated under colonial law.

The books used by the colonial courts were not the only sources available. There existed a wider range of Isma'ili and Islamic sources which could have shed quite a different light on the various Isma'ili communities and their respective histories. Simone Assemani, a professor of oriental languages at the University of Padova, published an article in 1806 which concluded, among other things, that European authors knew nothing of the religious doctrines of the Assassins.¹⁹ However, it was not until the early twentieth century that much attention was given to any rigorous research into the origins and history of Isma'ilis using sources that were more sympathetic to the sect, such as previously ignored Isma'ili manuscripts, and a critical reading of non-Isma'ili Arabic sources.²⁰

This new period of Isma'ili historiography was dominated by the works of Wladimir Ivanow, spurring on a lively publication of both his research and that of another colleague, Asaf A. A. Fyzee, in the Journal of the Bombay Branch of the Royal Asiatic Society.²¹ Ivanow has tended to limit his nineteenth and early twentieth century studies to the Western

1835. Hailed as a seminal work during its time it was still considered an authority well into the twentieth century. For example, Freya Stark cites it as the most authoritative history of the Assassins. Burman, The Assassins, 149.

¹⁹Burman, The Assassins, 147-148.

²⁰An example of this is Ivanow's translation and discussion of the Diwan of Khaki Khosani in: Wladimir Ivanow, An Abbreviated Version of the Diwan of Khaki Khosani (Bombay: Oxford University Press, 1933).

²¹See Wladimir Ivanow, A Brief Survey of the Evolution of Ismailism (Leiden: E. J. Brill, 1952); Wladimir Ivanow, "Early Shi'ite Movements" Journal of the Bombay Branch of the Royal Asiatic Society N.S. 17 (1941), 1-23; Wladimir Ivanow, "An Ismaili Interpretation of the Gulshani Raz" Journal of the Bombay Branch of the Royal Asiatic Society N.S. 8 (1932), 69-78; Wladimir Ivanow, "Ismailis and Qarmatians" Journal of the Bombay Branch of the Royal Asiatic Society N.S. 16 (1940), 43-85; Wladimir Ivanow, "The Sect of Imam Shah in Gujarat" Journal of the Bombay Branch of the Royal Asiatic Society N.S. 12 (1936), 19-70. Much of Ivanow's and Fyzee's articles on Isma'ili Bibliographic sources were noted above in footnote 12.

Isma'ilis, not Eastern Isma'ilis like the Khojas, and the majority of his research delves into early Isma'ili history and religion.²² Bernard Lewis has also written a number of interesting studies on early Isma'ilism, particularly focussing on the period referred to as the Assassins.²³

Currently, the most comprehensive contemporary secondary work on Isma'ili history and religion is by Farhad Daftary.²⁴ His work spans the entire history from the Prophet Muhammad to the 1980s and includes a substantial section on the Khoja community. While he explores the controversy within the community in the nineteenth century, the 1847 Khoja Female Inheritance Cases are described only in very limited terms. Daftary virtually ignores the entire issue of women's rights of inheritance in the Khoja community and the implications of placing a Muslim sect under Hindu law in matters of inheritance. Another survey work concerned specifically with India is Hollister's The Shia of India.²⁵ It deals with the history of the Shia, Ithna 'Ashari and Isma'ili communities in India and provides an excellent introduction to developments in the Khoja community during the nineteenth century. Although Hollister also notes the 1847 Khoja cases, it is within the context of the struggle within the community between the Aga Khan and the *barbhai*, and not explored beyond this dynamic. He also neglects to mention efforts to create a special Bill relating to the customs and laws of the Khoja community.²⁶

Khoja Community

Many of the secondary sources already mentioned provide background on the Khoja community. However, there are a few additional sources of interest. The Khoja community, as will be explored further in the next chapter, were converted by Isma'ili missionaries, or *pirs* in the 12th century. From the early to mid-nineteenth century, several hundred Khoja

²²Western Isma'ilis, as will be explained in Chapter Two, are distinct from Eastern Isma'ilis, whose Indian followers include the Khoja community. The Bohras, for example, are Western Isma'ilis.

²³Bernard Lewis, The Assassins. A Radical Sect in Islam (London: Weidenfeld and Nicolson; London: Al Saqi Books, 1985).

²⁴Farhad Daftary, The Isma'ilis. Their History and Doctrines (Cambridge: Cambridge University Press, 1990).

²⁵John Norman Hollister, The Shi'a of India (London: Luzac and Co., 1953; New Delhi: Oriental Books Reprint Co., 1979).

²⁶Hollister, The Shi'a of India, 367.

families migrated to Bombay, swelling their numbers from 150 families to 600.²⁷ The majority of Khoja men were involved in some form of trade or sales. Gradually, more and more used Bombay as their base to pursue trade opportunities, primarily in Africa, but also other parts of Asia.²⁸ By the end of the nineteenth century, the Bombay community numbered around 8,500 and was vibrant, relatively wealthy, with several members engaged in a wide range of economic activities.²⁹ Christine Dobbin's work on several merchant communities in Bombay contextualizes developments amongst the Khoja Isma'ilis with other commercial communities.³⁰

Other works of interest include Syed Mujtaba Ali's The Origin of the Khojas and their Religious Life Today.³¹ Ali's book provides important details regarding Khoja religious life and culture in Western India during the nineteenth century. Asghar Ali Engineer's The Muslim Community of Gujarat: An Exploratory Study of Bohras, Khojas, and Memons compiles information on the subsequent developments in the community. Specifically, it documents an oral history of the splinter groups, Sunni Khojas and Ithna 'Ashari Khojas, as well as the Isma'ili Aga Khani Khojas in post-Independence India.³²

Aga Khans

Works on the Aga Khans are useful for this study only in so far as they provide

²⁷Perry, in his 1847 judgement in *Hirbae v. Sonabae, Gungbae v. Sonabae*, estimated the number of Khojas in Bombay to be 2,000. Erskine Perry, Cases Illustrative of Oriental Life and the Application of English Law to India (London: Law Bookseller and Publisher, 1853; New Delhi: Asian Educational Services, 1988), 113. Testimony by Hassoon Syed indicated that in the early 1820's there were only 150 to 200 Khoja families in Bombay, the majority of whom lived quite modestly. Cassum Natha, in providing testimony for the case estimated that by 1847 the community was closer to 600 families, with approximately 1000 or 1500 persons. The Telegraph and Courier (24 June 1847): 599.

²⁸Dobbin, Urban Leadership in Western India, 154.

²⁹The total Khoja population in Western India was estimated at 50,837 (25,555 males and 25,282 females), according to the 1901 Census and 52,367 (26,387 males and 25,980 females) according to the 1911 Census. R. E. Ethnoven The Tribes and Castes of Bombay Vol. II (Bombay: Government Central Press, 1922), 217.

³⁰Christine Dobbin, Urban Leadership in Western India. Politics and Communities in Bombay City 1840-1885 (Oxford: Oxford University Press, 1972).

³¹S. Mujtaba Ali, The Origin of the Khojas and their Religious Life Today (Würzburg: Buchdruckerei Richard Mayr, 1936).

³²Asghar Ali Engineer, The Muslim Community of Gujarat: An Exploratory Study of Bohras, Khojas, and Memons (Delhi, 1989).

insight into the various Aga Khans' positions on women, both in their families and more specifically, with regards to the Khoja community. Also, any indication of their opinions on the court cases and the controversies are important. While there are numerous books on the Aga Khan family history, few make much of an effort to grapple with issues specific to the court cases or Khoja inheritance. A. S. Picklay's History of the Isma'ilis brings in his perspective and insight as an Isma'ili author.³³ It is significant to note that his history of the Isma'ilis is dominated almost entirely by a history of the Aga Khans and their ancestors. This feature is shared by nearly all biographies on the Aga Khans, to the exclusion of anything more than the most cursory mention of their numerous followers. Naroji M. Dumasia's two books on the Aga Khan's family are quite informative about the Aga Khans.³⁴ There is also the autobiography of Aga Khan III which reflects his understanding of events in his grandfather's and father's time and outlines his positions on the many issues facing the community, other Muslims, India and the world.³⁵ One of the most informative articles regarding the period up to the transference of the Imamate to India is by Hamid Algar.³⁶ He provides the Persian political, social and religious context for the activities of the Aga Khan I and brings out a dimension of the conflict not examined by other authors -- his Sufi affiliation and its political implications.

In a more popular vein, there are Burman's The Assassins, Willi Frischauer's The Aga Khans and Harry Greenwall's H.H. The Aga Khan Imam of the Ismailis.³⁷ More recently, Anne Edwards Throne of Gold, chronicles the Aga Khans' personal and professional lives, loves and leadership, with a keen interest in women of the Aga Khan family. This is done in a way not previously undertaken, even if it is popular both in its

³³A. S. Picklay, History of the Ismailis (Bombay, 1940). Bernard Lewis describes it as "a popular account written by an Ismaili author for Ismaili readers." Lewis, The Assassins, 144.

³⁴Naroji M. Dumasia, The Aga Khan and His Ancestors: A Biographical and Historical Sketch (Bombay: Times of India Press, 1939) and Naroji M. Dumasia, A Brief History of the Aga Khan (Bombay, 1903).

³⁵Sultan Muhammad Shah Aga Khan Memoirs of the Aga Khan: World Enough and Time (London: Cassell and Company Ltd., 1954).

³⁶Hamid Algar, "The Revolt of the Aga Khan Mahallati and the Transference of the Ismaili Imamate to India", Studia Islamica, 29 (1969), 55-81 and Hamid Algar, "Aqa Khan" Encyclopaedia Iranica, II (1987), 170-175.

³⁷Edward Burman, The Assassins. Holy Killers of Islam (London: Crucible, 1987); Willi Frischauer, The Aga Khans (London: The Bodley Head, 1970); and Harry J. Greenwall, H. H. The Aga Khan Imam of the Ismailis (London: The Cresset Press, 1952).

scope and orientation.³⁸

Legal Sources

There is a diverse body of literature on Indian legal history and many of these works mention the special legal status of the Khoja community. This is not surprising as the Khojas, Kutchi Memons, and other such communities had a well-established and accepted special status amongst Bombay lawyers and judges which was firmly entrenched in, and reinforced by, legal precedent.³⁹ There are even a few articles which specifically focus on the Khojas and other communities which, though Muslim, were recognized by the courts as distinct and having Hindu laws, modified by their own unique customs, applied in certain legal matters such as inheritance. Hamid Ali, for example, has written an excellent comparative work on the Khojas, Bohras, and related communities, examining various Islamic sects and their relationship with Muslim law in India.⁴⁰ Lokhandwalla has done likewise in his essay on Islamic law and Isma'ili communities.⁴¹ However, neither of these articles specifically deal with these communities' special position on women's rights of inheritance in a comprehensive way and instead serve more as introductory surveys of some of the legal issues involved.

Much of the material on the legal history of this period and the legalities of the issues examined here come in the form of teaching material for law students or guides to British-Indian law.⁴² Works on British-Indian legal history include: Jain's Outlines of Indian Legal

³⁸Anne Edwards, Throne of Gold: The Lives of the Aga Khans (London: HarperCollins Publishers, 1995). Significantly, Ms. Edwards and her two researchers based the book not only on secondary literature but also on interviews with the family and associates.

³⁹As it will be explored further in later chapters, the special status of the Khojas was also recognized for such communities as the Kutchi Memons and Bohras. It was even extended to cases pertaining to other Muslims who did not neatly fit in the categories of Islamic Law understood by the colonial courts. One striking example of this is seen in *Isap Ahmad v. Abhramji Ahmdadji* (1917) 19 Bombay Law Reporter 58, where it was considered irrelevant whether or not the petitioners were Khojas or Kutchi Memons, the precedent set for these communities was applied.

⁴⁰Hamid Ali, "The Customary and Statutory Laws of the Muslims in India" Islamic Culture 11 (1937), 354-454.

⁴¹S. T. Lokhandwalla, "Islamic Law and Ismaili Communities (Khojas and Bohras)" Indian Social and Economic History Review 4 (1967), 155-176.

⁴²Michael Anderson characterizes these as 'Black letter' studies as they "concentrate on legal texts: the interpretation of statutes and judgements, commentary upon judicial doctrine, and an *a posteriori* search for coherence within the internal logic of the law." Michael R. Anderson, "Classifications and Coercions: Themes in South Asian Legal Studies in the 1980s" South Asia Research 10, 2 (November 1990), 158.

History; Rankin's Background to Indian Law; Sinha's The Indian Civil Judiciary in Making; and Chandra's Development of Judicial System in India.⁴³ The only relatively recent scholarly work which analyses the legal issues involved in this period is Gregory Kozlowski's research on Muslim endowments under British colonial law.⁴⁴ While his study does not specifically concern itself with the Khoja community, much of the work he has done on British constructions of Muslim law has been significant in informing the analytical perspective of this thesis.⁴⁵

Guides to Muslim law in India include: Diwan's Muslim Law in Modern India; Gupte's Hindu Law in British India and Hindu Law of Succession; Markby's An Introduction to Hindu and Mahomedan Law; and Mulla's Principles of Mahomedan Law.⁴⁶ Macnaghten's work provides a look at both Hindu and Muslim law as it was understood and practised in the 1860s.⁴⁷ Most of these works mention the distinctive legal position held by the Khoja community. However, they have no interest in exploring the implications of such a position for Khoja women, their rights of inheritance, the community at large or how this in turn impacted Anglo-Indian law. As guides, such concerns are beyond their scope, however they were of tremendous utility when initially compiling a list of cases dealing with Khoja inheritance.

Related materials include Fyzee's extensive work on Islamic law, and in particular, those which pertain to the Bohra community and Western Isma'ili Law. In several of his

⁴³Mohabir Prashad Jain, Outlines of Indian Legal History (Bombay: N. M. Tripathi, 1972); George Claus Rankin, Background to Indian Law (Cambridge: Cambridge University Press, 1946); Chittaranjan Sinha, The Indian Civil Judiciary in Making, (New Delhi: Munshiram Manoharlal, 1969); and Ramesh Chandra Srivastava, Development of Judicial System in India (Lucknow: Lucknow Publishing House, 1971).

⁴⁴Gregory C. Kozlowski, Muslim Endowments and Society in British India (Cambridge: Cambridge University Press, 1985).

⁴⁵He does include one case (*Cassamally Jairajbhai Pirbhai v. Sir Currimbhoy Ibrahim*) on the Khoja community dealing with *waqfs*, described in Kozlowski, Muslim Endowments and Society in British India, 71-3, 151-2.

⁴⁶Paras Diwan, Muslim Law in Modern India (Allahabad: Allahabad Law Agency, 1977); S. V. Gupte, Hindu Law in British India 2nd ed., (Bombay: N. M. Tripathi, 1947), 1112-8 and S. V. Gupte assisted by G. M. Diekar, Hindu Law of Succession (Bombay: N. M. Tripathi, 1963), 328-330; William Markby, An Introduction to Hindu and Mahomedan Law (Oxford: Clarendon Press, 1906; Boston: Milford House, 1974); and M. Hidayatullah, assisted by R. K. P. Shankardass, Mulla Principles of Mahomedan Law 16 ed. (Bombay: N. M. Tripathi, 1968).

⁴⁷Sir William Hay Macnaghten, Principles of Hindu and Mohammadan Law 4th ed., (London: Williams and Norgate, 1868). Macnaghten's work was consulted in many of the court cases examined in this thesis.

explorations of Western Isma'ili Law, he makes reference to parallels with the Khoja community and Eastern Isma'ilis.⁴⁸ Lokhandwalla also makes similar brief references to the Khojas in his PhD thesis on Isma'ili law and an article on the Bohra community.⁴⁹ Mandelung focuses almost entirely on the Western Isma'ili laws in his paper on Islamic sources for Isma'ili laws, as does Mu'izz Gorianwala in his exploration of the religious beliefs of the Bohras.⁵⁰

Women and Law

Many scholars of gender issues in India today agree with Bina Agarwal's assertion that not only is the issue of women and property significant, but "[e]ffective rights in property... are of critical importance for women's economic and social empowerment in India."⁵¹ The entire question of women and their rights of inheritance in today's India is also intensely political. While an increasingly wider and broader range of literature is emerging on women and law in India, the majority of these works are concerned with issues of social justice and address specific problems such as dowry deaths or debate the efficacy of introducing a uniform civil code. Many of these works hold the assumption that the law must do more to improve the position of women in Indian society. They also argue that although women legally possess many rights, the entire system is so patriarchal and entrenched in perpetuating gender injustice that women are not always able to access or be protected by these laws. They further suggest that feminist lawyers and activists must, therefore, be constantly vigilant to defend women's rights and work hard at changing the system to create a new social and legal environment within which women can truly be equals with men.

Hence, a thread in many of these works is an explicit social agenda and an assumption that

⁴⁸Asaf A. A. Fyze Outlines of Muhammadan Law 4th ed., (Delhi: Oxford University Press, 1974); "Bequests to Heirs" Journal of the Bombay Branch of the Royal Asiatic Society N.S. 5 (1930), 141-5; and "The Isma'ili Law of Mut'a" Journal of the Bombay Branch of the Royal Asiatic Society N.S. 8 (1932), 85-92.

⁴⁹S. T. Lokhandwalla, "Origins of Ismaili Law" (PhD diss., University, 1951) and S. T. Lokhandwalla, "The Bohras, a Muslim Community of Gujarat", Studia Islamica, 3 (1955), 117-135.

⁵⁰Wilfred Mandelung, "Sources of Isma'ili Laws" Journal of Near Eastern Studies 35, 1 (1976), 29-40 and Mu'izz Goriawala, "The Beliefs of the Ismailis - a short account" Orita 3, 2 (1969), 83-91.

⁵¹Bina Agarwal, "Gender and Legal Rights in Agricultural Land in India" Economic and Political Weekly (March 25, 1995), A-39. I would like to thank Jon Dessau for bringing this article to my attention.

legislation and the legal system can be agents of social change. Yet they equally recognize the challenges facing women in India today and trace these difficulties to their colonial roots.⁵²

Publications on colonial law and women reflect these preoccupations. Much of the literature on women and colonial law has focused on certain key issues: the abolition of *sati*, dowry, widow remarriage, age of consent for sexual relations, and female infanticide. Others are more concerned with labour legislation and the woman worker and, by the end of the nineteenth century, attention was turned to the politics of representation, including women's right to vote.⁵³

Many social reformers of the nineteenth and early twentieth century wrote about women, their problems, championed certain causes, and, in some cases, agitated for legislative responses. Figures such as Rammohun Roy, Pandita Ramabai, Datyananda Sarawati, Keshab Chandra Sen, Justice Mahadev Govind Ranade, D. K. Karve, Swarni Vivekananda, and Mahatma Gandhi spoke and wrote passionately about women and their problems in society.⁵⁴ The 'Woman Question' was key to many social reform debates, and, as will be demonstrated in this thesis, was no different in the case of the Khojas and the law, where women were more a site for battle between contesting forces than a reflection of genuine concern with women's status and rights in society.⁵⁵

In terms of literature concerned with women and colonial law in India, none deal specifically with the Khoja community. While there are a number of articles and general surveys on women and the law in India, few, until recently, provide a comprehensive guide to the field. A significant new contribution is Janaki Nair's Women and Law in Colonial India.⁵⁶ Nair's book is a landmark effort at providing an introduction to the social history of

⁵²Examples of such works include: Archana Parashar, Women and Family Law Reform in India (New Delhi: Sage, 1992) and Indu Prakash Singh, Women, Law and Social Change in India (New Delhi: Radiant Publishers, 1989).

⁵³I have broadly adopted the categories used by Janaki Nair in her book Women and Law in Colonial India (Delhi: Kali for Women, 1996).

⁵⁴Singh, Women, Law and Social Change in India, 19. See Partha Chatterjee "The Nationalist Resolution of the Women's Question" in Recasting Women, 233-253. Also of interest: Leslie A. Fleming, "Between Two Worlds: Self-Construction and Self-Identity in the Writings of Three Nineteenth-Century Indian Christian Women" in Women as Subjects, 81-107.

⁵⁵Feminist scholars have begun to critique many 'tussles' over social reform and women as leading to little real change for women's status in society. See Delores F. Chew, "Out of the Antahpur? Gender Subordination and Social Reform in Nineteenth Century Bengal" (M.A., Concordia University, 1988).

⁵⁶Janaki Nair, Women and Law in Colonial India (Delhi: Kali for Women, 1996).

women and law in colonial India. Nair's framework is derived from feminist legal theory and historiography, through which, she argues, legislative attempts to transform the status of women in colonial India may be understood. Her own admission regarding the paucity of published materials on the subject is telling: "I began this book on an optimistic note, believing that there was enough published material on the social history of women and law in colonial India that could be readily tapped for an introductory work such as this. Regrettably, no such fund of material exists as yet."⁵⁷ Some earlier research, their limitations and strengths, are provided below.

One earlier work which specifically addresses a Hindu woman's right to property is Roop Chaudhary's survey of the different historical roots of women and inheritance issues. She examines how these 'traditions' were adopted by the colonial legal system and goes on to explore their implications in post-independence India.⁵⁸ A more comprehensive study of women's rights of inheritance in India is by Dr. B. Sivaramayya. Sivaramayya's research not only examines the position of Hindu and Muslim women in India, but also draws comparisons with their counterparts in Quebec and New York State.⁵⁹ Indu Prakash Singh adds another voice to the field of women and law. Singh's work analyses the patriarchal underpinnings of law and women's rights in India.⁶⁰ While these works refer to the development of laws impacting on women in the colonial period, their stated aims are to address post-independence situations and concerns.

Lucy Carroll has written a series of articles concerning women's rights of inheritance in India. Specifically, she outlines a Hindu daughter's right of inheritance, a widow's right of inheritance and notes several issues relating to a woman's inheritance position within both Hanafi and Ithna 'Ashari Laws of intestate succession.⁶¹

⁵⁷Nair, Women and Law in Colonial India, 17.

⁵⁸Roop L. Chaudhary, Hindu Woman's Right to Property (Past and Present) (Calcutta: Firma K L. Mukhopadhyay, 1961).

⁵⁹B. Sivaramayya, Women's Rights of Inheritance in India (Madras: The Madras Law Journal Office, 1973).

⁶⁰Indu Prakash Singh, Women, Law and Social Change in India (New Delhi: Radiant Publishers, 1989).

⁶¹Lucy Carroll, "Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry" Modern Asian Studies 25, 4 (1991), 791-809; Lucy Carroll, "Law, custom, and statutory social reform: the Hindu Widows' Remarriage Act of 1856" in Women in Colonial India. Essays on Survival, Work and the State, 1-26, J. Krishnamurty, ed., (Delhi: Oxford University Press, 1989); Lucy Carroll, "The Hanafi Law of

An interesting example of more current concerns is found in Ratna Kapur and Brenda Cossman's Subversive Sites: Feminist Engagements with Law in India.⁶² Magazines like Manushi have long been concerned with women and the law in India.⁶³ Similarly the Economic and Political Weekly [EPW] has over the past fifteen years published a number of perspectives and articles pertaining to women and the law. Particularly useful are articles that trace nineteenth century legal foundations for current difficulties. Most significant among these are Bina Agarwal's exploration of gender and land rights in agricultural land in India, Sudhir Chandra's article on Rukhmabai, Lata Mani's work on the production of an official, legislative discourse on *Sati*, and Janaki Nair's examination of Devadasis, *dharma* and the state.⁶⁴ Other articles dealing with specific issues pertaining to women and colonial law are Delores Chew's examination of the problem of Hindu widows and their treatment under the law in nineteenth century Bengal and Kozlowski's work on Muslim women and control of property in northern India.⁶⁵

Muslim law also has Safia Iqbal, Alka Singh and others who outline post-independence conditions of women under Muslim Personal Law in India.⁶⁶ Much more literature is available on women and Islamic law in other countries,⁶⁷ but none of these consider the particular position held by women in Muslim sects other than Ghadially's

Intestate Succession: A Simplified Approach" Modern Asian Studies 17, 4 (1983), 629-670; Lucy Carroll, "The Ithna Ashari Law of Intestate Succession: An Introduction to Shia Law Applicable in South Asia" Modern Asian Studies 19, 1 (1985), 85-124.

⁶²Ratna Kapur and Brenda Cossman, Subversive Sites. Feminist Engagements with Law in India (New Delhi: Sage Publications, 1996).

⁶³Manushi articles concerned with women and the law are too numerous to note here.

⁶⁴Agarwal, "Gender and Legal Rights in Agricultural Land in India", A39-56; Sudhir Chandra, "Rukhmabai: Debate Over Woman's Right to Her Person" EPW 31, 44 (November 2, 1996), 2937-47; Lata Mani, "Production of an Official Discourse on *Sati* in Early Nineteenth Century Bengal" EPW 21, 17 (April 26, 1986), WS32-40; Janaki Nair, "The Devadasi, Dharma and the State" EPW 29, 50 (December 10, 1994), 3157-67.

⁶⁵Delores F. Chew, "The Case of the 'Unchaste' Widow: Constructing Gender in 19th-Century Bengal" RFR/DRF (special issue on Colonialism, Imperialism and Gender) 22, 3 & 4 (Fall/Winter 1993), 31-40; Gregory C. Kozlowski, "Muslim women and the control of property in North India" in Women in Colonial India. Essays on Survival, Work and the State, 114 -132, J. Krishnamurty, ed., (Delhi: Oxford University Press, 1989).

⁶⁶Safia Iqbal, Women and Islamic Law (Delhi: Adam Publishers, 1991); Alka Singh, Women in Muslim Personal Law (New Delhi: Rawat Publications, 1992).

⁶⁷One interesting example is: Jamal J. Nasir, The Status of Women Under Islamic Law (London: Graham & Trotman, 1990).

research on the Bohra community.⁶⁸ More research and writing on Muslim women and the law in India was sparked in the late 1980's by the controversy over the Shah Bano case. Shah Bano, a divorced Muslim woman sued her ex-husband for maintenance under section 125 of the 1973 Code of Criminal Procedure. Notable among such works is Engineer's collection of essays on the issue.⁶⁹ It has since been revisited by a number of activists and scholars, but none of these articles directly pertain to the issues being dealt with in this thesis.⁷⁰

Court Documents

In both the National Archives of India and the Maharashtra State Archives, considerable material has been preserved regarding the Khoja community, and more specifically, the Law Commission which sought to draft a Bill for Khoja inheritance and succession in the late nineteenth century. Proposals, various draft bills, discussion on these drafts, petitions, and internal government memoranda, all provide tremendous insight into how the various actors perceived Khoja women and their inheritance rights. With the exception of Masselos, few scholars have examined this archival material on the Khojas. Masselos's research is particularly significant as, in one article, he threads together court cases and crises in the community to demonstrate a crystallization of membership criteria in the Khoja community during the nineteenth century.⁷¹ However, the article does not delve deeply into the specific issue of how the courts and the community perceived and dealt with conflicts over women's inheritance rights, nor does it set out to do so.

The colonial courts generated a number of documents with the judgements rendered on various disputes over inheritance, and other issues, in Khoja families. A number of

⁶⁸Rehana Ghadially, "Women and Personal Law in an Isma'ili Shi'ah (Da'udi Bohra) sect of Indian Muslims" *Islamic Culture* 70, 1 (January 1996), 27-51.

⁶⁹Asghar Ali Engineer, ed., *The Shah Bano Controversy* (Hyderabad: Orient Longman Limited, 1987). See also Zakia Pathak and Rajewari Sunder Rajan's "Shahbano" published in *Signs: Journal of Women in Culture and Society* 14, 31 (Summer 1989), 558-82 and Tahir Mahmood, "Shah Bano Judgment: Supreme Court Interprets the Quran" *Islamic and Comparative Law Quarterly* 5 (1985), 110-20.

⁷⁰Of general interest, including mention of the Shah Bano case, is Gail Minault's survey of women's studies in the late 1980's. Gail Minault, "Legal and Scholarly Activism: Recent Women's Studies on India - A Review Article" *The Journal of Asian Studies* 47, 4 (November 1988) 814-20.

⁷¹J. C. Masselos, "The Khojas of Bombay: The Defining of Formal Membership Criteria during the Nineteenth Century" *Castes and Social Stratification Among Muslims in India*, Imtiaz Ahmed, ed., (New Delhi: Manohar, 1978), 97-116. See fn 5, above, regarding archival research on the Khojas.

speeches and judicial commentaries were also published. Examples of these are the speech by Howard, counsel for the defense, in the 1866 Aga Khan case,⁷² and the discussion of the 1847 Khoja Female Inheritance cases by the presiding Judge, Sir Erskine Perry.⁷³ While it was not until 1875 that court reports were officially published in the Indian Law Reporter, a number of the cases had their decisions documented and published in a variety of legal journals.⁷⁴ Judgements can therefore be found in such publications as: Bombay High Court Reports, Bombay Law Reporter, and Indian Appeals. A sufficient number of cases concerning Khoja women and inheritance can be found to explore the problem of how Hindu law was applied to a Muslim sect and its implications for the legal position of women in the community.⁷⁵

Other Primary Sources

Another primary source is the reporting of the court cases in the press. Testimony and background regarding the judges' decisions were provided in newspaper reports on the cases. Newspapers also provide commentary on the Khoja community and its customs, relations with other communities, and their status as emerging merchant communities in Bombay. Newspapers which are utilized in the thesis include: The Bombay Telegraph and Courier; The Bombay Times and Commerce; The Bombay Gazette; and The Times of India.

In addition to these sources, some general information on the Khoja community is contained in the Gazetteer of Bombay Presidency.⁷⁶ There is also Enthoven's The Tribes and Castes of Bombay.⁷⁷ Buckland's Dictionary of Indian Biography also provides some

⁷²E. I. Howard, The Shia School of Islam and its Branches, Especially that of the Imamee Ismailis: A Speech Delivered in the Bombay High Court in June 1866 (Bombay: Bombay Education Society, 1895).

⁷³Erskine Perry, Cases Illustrative of Oriental Life and the Application of English Law to India (London: Law Bookseller and Publisher, 1853; New Delhi: Asian Educational Services, 1988).

⁷⁴This was in pursuance of the Indian Law Reports Act, 1875, which gave rise to the official series of reports, known as the Indian Law Reporter. Each High Court had its own series, hence in this thesis, the report most frequently consulted is the Indian Law Reporter, Bombay Series.

⁷⁵For a comprehensive list of Khoja court cases, see the Bibliography. Khoja Case Notes are contained in Appendix IV.

⁷⁶Bombay Government, Gazetteer of Bombay Presidency Vol. XI, Part II. Gujarat Population: Musalmans and Parsees (Bombay: Bombay Government Press, 1899), 36-51.

⁷⁷Reginald E. Enthoven, The Tribes and Castes of Bombay Vol II (Bombay: Government Central Press, 1922).

information on British officials from the period under scrutiny.⁷⁸ Some of the legal figures are described in P. B. Vaccha, Famous Judges, Lawyers and Cases of Bombay.⁷⁹ A number of prominent Khojas are included in Jain's two-volume Muslims in India. A Biographical Dictionary and in the publication Representative Men of the Bombay Presidency.⁸⁰

Complimenting these sources are memoirs and reminiscences. Wacha's work, Shells from the Sands of Bombay: My Recollections and Reminiscences, 1860-1897,⁸¹ provides insight into the context of life in Bombay in the mid 19th century, as well as commentary on some of the prominent figures in the Khoja court cases. Tyabji's "Social Life in 1804 & 1929 amongst Muslims in Bombay" speaks directly to the issue of the social customs of the Khojas and how they differed from other Muslim communities in Bombay with specific attention to purda and the position of women.⁸² For a portrait of a young Khoja girl, whose family belonged to a dissident Ithna 'Ashari Shi'a faction, there are Ishvani's memoirs.⁸³ In this vein, there are also the memoirs of Aga Khan III, mentioned earlier, which provide a series of anecdotes regarding the first Aga Khan and illustrate a semi-official Isma'ili perspective on the nineteenth century controversies.⁸⁴

As has been clearly demonstrated by the literature review, this study situates itself within a body of previous research, yet forges a new understanding with an examination of a particular topic which has not received sufficient attention.

⁷⁸C. E. Buckland, Dictionary of India Biography Reprint (New York: Haskell House Publishers Ltd., 1969).

⁷⁹P. B. Vaccha, Famous Judges, Lawyers and Cases of Bombay. (Bombay: Tripathi, 1962).

⁸⁰Naresh Kumar Jain, ed. Muslims in India. A Biographical Dictionary. Volume I (A-J) (New Delhi: Manohar, 1979) and Jain, Muslims in India. A Biographical Dictionary. Volume II (K-Z) (Delhi: Manohar, 1983). Representative Men of the Bombay Presidency, 2nd ed., (Bombay: C. B. Burrows, 1900).

⁸¹Dinsha Edulji Wacha, Shells from the Sands of Bombay: My Recollections and Reminiscences, 1860-1897 (Bombay: "The Bombay Chronicle" Press, 1920).

⁸²F. B. Tybaji, "Social Life in 1804 & 1929 Amongst Muslims in Bombay" Journal of the Bombay Branch of the Royal Asiatic Society N.S. 6 (1930), 286-300.

⁸³Ishvani, The Brocaded Sari (New York: John Day Company, 1946) or Ishvani, Girl in Bombay (London: Pilot Press, 1947).

⁸⁴Sultan Muhammad Shah Aga Khan Memoirs of the Aga Khan: World Enough and Time (London: Cassell and Company Ltd., 1954).

Chapter Two

Isma'ili History and the Khojas

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ISMA'ILI HISTORY AND THE KHOJAS

The Khojas evolved into a unique social-religious community in Western India. The 1847 Khoja Female Inheritance cases recognized this distinctiveness by establishing a legal precedent that accepted the application of Hindu laws of inheritance to a Muslim sect. The seeming contradiction that this decision posed can only be understood within the context of the development of Isma'ilism and the way in which the Khoja community was converted.

Isma'ili history is complex and fraught with sectarian strife. After the Sunni-Shi'a schism, Isma'ilis split away from mainstream Shi'a Islam. A later battle, between Musta'li and Nizari Isma'ili factions, led not only to religious but also political separation. The loss of Nizari political control eventually necessitated doctrinal innovations to cope with the new situation and had implications for the relationship between the spiritual leader and converts, like the Khojas, in India and elsewhere. An examination of Khoja conversion, and the missionaries who brought them into the Nizari Isma'ili fold, helps explain the ambiguous role that Hinduism plays within the community.

Equally significant is an exploration of the changes and tensions within the Khoja community in the nineteenth century. There was a dramatic struggle for power between the spiritual leader, the Aga Khan I, and a dissident party of reform-minded Khojas, the *barbhai*. At times, these struggles became violent and led to police involvement and criminal charges. These community conflicts resulted in appeals to the colonial courts. The first case took place in 1829 when the representatives of the Aga Khan tried to force the Khoja community to pay him a religious tithe. It was withdrawn before any decision was made. The second case, the 1851 Great Khoja Case, was a dispute over access to community property. It was resolved with a declaration of rights, not a formal ruling. The third case, the 1866 Aga Khan Case, explicitly dealt with community property, ownership and authority. The history of Isma'ilism, the conversion of the Khojas, and the controversies between the Aga Khan and dissident Khojas, provide crucial background necessary to understand the unique position of Khoja community in the nineteenth century and the implications such a position had for the colonial courts.

Islam and the Sunni - Shi'a Schism

Islam emerged in the sixth century¹ as a powerful new religious and political force. Islam, in essence, means submission to the will of god. Belief in one god, Allah, is the most important tenet in the religion, with the Prophet Muhammad being considered god's messenger.² Muhammad was born in Mecca in 570 and by 613 began to amass followers. He preached of revelations from Allah and urged the abandonment of polytheistic customs. His strong reformist stance on many issues soon aroused hostility and in 622, Muhammad fled with a small group of followers to Medina.³ Muhammad was not only well received in Medina, but soon rose to prominence by establishing a theocratic state, eliminating internal strife and eventually forging an army of believers from amongst the disparate tribes of Arabia. With the death of the Prophet Muhammad in 11/632, Muslims were faced with the problem of who would lead their growing community.⁴

A major dispute arose over who should succeed the Prophet Muhammad after the fourth *Khalif*, 'Ali.⁵ Different positions on how the next leader should be selected resulted in the Sunni-Shi'a split. Succession had been a problem from the outset as the Prophet Muhammad had not provided clear instructions on this matter, either in the *Koran* or the *sunna*. At the time of the Prophet's death, the majority of the Companions of the Prophet⁶ favoured and practiced a relatively democratic process. Prior to the Sunni-Shi'a split, each

¹Dates in this study will be provided in four forms. One form is according to the Islamic calendar, signified by the use of A.H., meaning after *hijra*, the flight to Medina. The second form is according to the Christian calendar only, where no further indication of calendar or explanation is provided. The third form is noted by the use of both Islamic and Christian calendars with the format of the Islamic date first followed by the Christian. An example of this is 95/714, which means in the 95th year after *hijra* or the 714th year A.D. The fourth form is according to the Hindu calendar as the Khojas used it when providing dates in their court testimony and will be noted as such.

²The *kalima* is translated as: "There is no god but Allah, and Muhammad is his Prophet."

³Both Mecca and Medina, then known as Yathrib, are in the region of Arabia now part of Saudi Arabia.

⁴Rodolphe J. A. De Seife, The Shar'ia. An Introduction to the Law of Islam (San Francisco: Austin & Winfield, 1994), 5, 8, 20-4

⁵The *Kalif* or Caliph literally refers to 'he who follows behind,' a successor. It was the title given to the religious leader of Muslims after the Prophet. Clifford Edmund Bosworth, The Islamic Dynasties. A chronological and genealogical handbook (Edinburgh: Edinburgh University Press, 1967), 3. Gradually this term tended to be more associated with Sunni Muslims. Shi'as also used the title *Imam* for their religious head.

⁶These men were the leaders of the various tribes which were drawn to the message of the Prophet Muhammad and helped him forge the religious (and military) community of Muslims.

successor to leadership of the early Muslim community was chosen by a council comprised of each tribes' elders. The first man elected to succeed the Prophet Muhammad in this manner was Abu Bakr, the Prophet's father-in-law.⁷

Even at the time, however, there were those who disagreed with the manner in which Abu Bakr was chosen and their allegiance lay instead with 'Ali, son-in-law of the Prophet Muhammad through his daughter Fatima.⁸ 'Ali was said to have accepted the authority of Abu Bakr in the interest of unity, but those who supported his primary and exclusive right to succession were a significant and ardent minority, known as *Shi'at 'Ali*. Although 'Ali was eventually elected as the fourth *Khalif*, the unity found under the Prophet Muhammad and Abu Bakr quickly crumbled. After intense, complicated and indecisive battles between several factions, the *Khalifa*⁹ was split and the Sunni-Shi'a schism occurred.¹⁰

The Sunni-Shi'a split, centering around the role of the Imams and religious leadership, led to doctrinal differences and remains to this day a significant difference within Islam. Sunni Muslims gradually moved away from the reliance on the descendants of the Prophet Muhammad as religious leaders for their understanding of Islam. By contrast, the Shi'as maintained the supremacy of the Imam in all religious matters. Just as the Sunni community turned towards the *Koran* and the *Sunna* for guidance on religious issues, the Imam became the spiritual guide for the Shi'a community. To Shi'as, the Imams were seen as the true keepers of the Prophet Muhammad's religion whereas to the Sunnis, who saw the Prophet as the only one capable of such divine insight, this belief was perceived as heretical.¹¹ As a

⁷ Abu Bakr (d.13/634) was the father of the Prophet Muhammad's favourite wife, A'isha, and was an old and trusted supporter. Abu Bakr had proved himself in the Ridda wars when he restored the authority of Medina and Islam in outlying parts of the Arabian peninsula after Bedouin tribes revolted against Muhammad. Clifford, *The Islamic Dynasties*, 3.

⁸ 'Ali was not only the Prophet's son-in-law, but also his first cousin and foster-brother.

⁹ The *Khalifat* or *Khalifa* was the governing body associated with the *Khalif*. Similarly, the *Imamate* was the name used for the *Imam*.

¹⁰ Umar b. al-Khattab (d. 23/644) succeeded after Abu Bakr. Like Abu Bakr, his daughter was also married to the Prophet Muhammad. He is credited with turning the energies of Islam's faithful into vigorous campaigns of conquest against Byzantine controlled regions (Syria, Israel, Jordan and Egypt) and Sasanid areas (Iran and Iraq). After 'Umar's murder, 'Uthman b. 'Affan (d. 35/656) was elected as leader. His leadership was fraught with rebellion and strife, ending in his assassination. Unity under the fourth *Khalif* 'Ali was short-lived. With his murder in 40/661, the early Muslim community split into Sunnis and Shi'as. Clifford, *The Islamic Dynasties*, 3-4. For a more detailed version of events and how they are significant to the development of Shi'a Islam, see Farhad Daftary, *The Isma'ilis: Their History and Doctrines* (Cambridge: Cambridge University Press, 1990), 33-47. See also, John Norman Hollister, *The Shi'a of India* 2nd ed., (New Delhi: Oriental Books Reprint Corporation, 1979), 6-8.

result, the continuation of the *silsilah*, or lineage from the prophets, was crucial to Shi'a Islam but not a concern for Sunni Islam.

Amongst Shi'as, different divisions existed and hence also different understandings of what constituted the proper path in life for a believer. The importance of the Imamate to Shi'as meant that each succession was key to controlling the community. Due to the pivotal role of the Imamate, controversies within the community expressed themselves in conflicts over who would succeed, with the inevitable consequence being the development of more and more subdivisions among the Shi'a followers. Rather than having 'legal' schools to guide these communities, each Shi'a sect developed its own way of interpreting what customs and 'laws' best epitomized an ideal Islamic life. Hence everything from how to pray to matters of inheritance was inextricably linked to the specific sect to which a Shi'a Muslim belonged.

The Emergence of Isma'ilism

To understand the position of the Khoja community in Islam, one must understand the impact various schisms had on the development of the sect of Islam to which they were converted and continued to ally themselves. The Khoja community follow the Aga Khani Qasim-Shahi Nizari Isma'ili Shi'a form of Islam. Each distinction, Qasim-Shahi, Nizari, or Isma'ili, denotes the point at which a schism occurred. 'Aga Khani' was used to indicate those Khojas who accepted the Aga Khan as their spiritual leader and revered him as the direct descendent of the Prophet Muhammad. Therefore, to understand the Khojas, one must examine how the Isma'ili and Nizari divisions occurred, the doctrinal innovations after the Qasim-Shahi schism, and the implications of each on the form of Islam followed by the Khoja community.¹²

While the passing on of leadership was problematic at nearly every succession, it was not until after the Imam Ja'far al-Sadiq,¹³ that the community was faced with its greatest

¹¹ Asghar Ali Engineer, The Muslim Communities of Gujarat. An Exploratory Study of Bohras, Khojas and Memons (Delhi: Ajanta Publications, 1989), 24.

¹² See Appendix I for the *silsilah* of the Shi'as prior to the Isma'ili Nizari split. See Appendix II for the *silsilah* of the Nizari Imams.

¹³ After the murder of the Prophet's son-in-law 'Ali, the succession passed first to 'Ali's elder son, Hasan, and then to his younger son, al-Husain. Both Hasan and Husain were born to 'Ali and his primary wife Fatima, the Prophet Muhammad's daughter. 'Ali is reputed to have had seventeen sons and nineteen daughters by the twelve wives he married after the death of Fatima. He also had three hundred and ninety five mates

division.¹⁴ With Ja'far's death in 148/765, those who supported the claim of his eldest son, Isma'il al-Mubarak, became known as Isma'ilis or Seveners.¹⁵ Those who accepted Ja'far's younger son, Musa al-Kazim (d. 183/799), as the legitimate successor are known as Ithna 'Asharis or Twelvers, as their Twelfth Imam, the *mahdi*, disappeared and went into hiding around 260 /873.¹⁶ The Ithna 'Ashari Shi'as soon became the most prevalent Shi'a community and consider all others to be minor sects. As the dominant Shi'a group, much like their mainstream Sunni counterparts, Ithna 'Asharis have historically persecuted Isma'ilis and other Shi'a splinter groups.¹⁷

In political terms the Isma'ilis were the inheritors of the Fatimid dynasty.¹⁸ After firmly establishing a base in North Africa early in the tenth century, the Fatimids spread their influence from the Maghrib in the west to Sind in the east and Yemen in the south. By the early eleventh century, the Fatimid *Khalif* was given allegiance by Shi'as in almost half the Islamic territories. During this period there was extensive missionary activity beyond the Fatimid Empire, including the Indian sub-continent.¹⁹ Internal and external pressures,

(*azwaj*) -- women under his protection after, for example, becoming a captive slave. Some of these mates may have also bore him children. See Hollister, The Shi'a of India, 17. Al-Husain was succeeded by his son, 'Ali Zain al'Abidin (d. 95/714) and then Muhammad al-Baqir (d. ca. 114/732) became the Imam of the Shi'a community.

¹⁴An excellent source on this schism and early Isma'ilism is found in Bernard Lewis, The Origins of Isma'ilism (Cambridge: Cambridge University Press, 1940; New York: AMS Press, 1975).

¹⁵Isma'ilis are known as 'Seveners' by non-Isma'ilis since they splintered off from the main branch of Shi'a Islam with the Seventh Imam.

¹⁶The twelfth Imam, Muhammad al Muntazar, al Qa'im, was said to have been the son of the eleventh Imam, Hasan al Askari (d. 260/873) and a Byzantine Christian slave, Narjis (Narcissus) Khartun. The facts of his life and death are shrouded in mystery, more in the realm of myth and legend than verifiable dates and details. It is said that from the date of his father's death, he entered into his concealment (*ghaibat*). From this point he communicated with his followers through four chosen representatives for nearly seventy years. This period, 260-329 A.H., is known as the Lesser Concealment (*Ghaibat Sughra*). Since then, he has become known as the Hidden Imam, the *mahdi* (the "guided one", messiah) for whom the faithful await. See Hollister, The Shi'a of India, 92-100.

¹⁷Hollister, The Shi'a of India, 78.

¹⁸For a brief overview of the Fatimids see the chapter on the Fatimid Dynasty in: Clifford, The Islamic Dynasties, 46-8. For a more detailed introduction, see the chapter on Fatimid Isma'ilism in Daftary, The Isma'ilis, 144-255.

¹⁹The conversion of followers in India was part of a long term effort by the Isma'ilis to extend their religion and influence into areas like India. While there are some indications that efforts were made by Isma'ilis' grandsons around Kharasan and Qandahar, in Sind, there are questions regarding this. Rashid al-Din Fadl Allah argued that the sons of Muhammad b. Isma'il established themselves in Sind. However, another scholar, S. M. Stern, demonstrated that there were inconsistencies in the account. There are verifiable Isma'ili records suggesting that the Yemenite branch of the Isma'ili community, lead by Abu al-Qasim bin Hawshab, sent al-Haytham to Sind in 883 A.H. There is later mention of this early community in 967 A.H. and that work had spread into Gujarat. Other evidence of the spread of Isma'ili influence in India is provided in the

however, caused a rapid decline of the Fatimid Empire and *Khalifa*. The external pressures were related to Sunni resurgence and eventual loss of Fatimid political control of the Empire while the internal pressures were expressed in struggles over succession.

The Musta'ili - Nizari Schism

The greatest controversy within the Isma'ili sect came with the death of the Imam al-Mustansir Billah and a power struggle within the Fatimid *Khalifa*. Al-Mustansir ruled from 427-487/1035-1094. On his death, his sons fought over the right to be the next Imam, with each son claiming to have been chosen by his father. While there is evidence to suggest that the elder son, Nizar, was favoured by al-Mustansir, the Prime Minister, al-Afdal, supported the claims of the younger son, Musta'li (d. 495/1101), who was also his brother-in-law. With the backing of al-Afdal, Musta'li inherited the spiritual leadership of the Fatimid Empire. Nizar did not accept this decision and he revolted against both the government and his brother. He left the area now known as Egypt,²⁰ and went to Alexandria, proclaiming himself al-Mustafa li-dinillah, meaning 'the chosen for God's religion.' In the struggle, Nizar appears to have lost and is said, by Musta'li's adherents, to have submitted to Prime Minister al-Afdal in exchange for sparing his life. According to the Musta'li faction, Nizar later died in Egypt.²¹

Those Isma'ilis who sided with Prime Minister al-Afdal and Musta'li continued to exercise power and control in the region.²² It was following the death of Musta'li's grandson, al-Amir, that the community became further divided by a schism caused by a

records of Al-Muqaddasi who visited Multan in 985 A.H. He wrote that the city was not only Shi'a but that the inhabitants gave their allegiance to the Fatimid *Khalifa*. Other evidence of Isma'ili activity was in Cambay, Gujarat, during the reign of Mahmud Bagra. When he annexed Kutch he found tribes who claimed to be Muslim but were unaware of the *shari'a* and other fundamentals of Sunni Islam. Some scholars have suggested that these tribes were Isma'ilis. For further information on this subject, see G. Allana, Ginans of Ismaili Pirs (Karachi: His Highness Prince Aga Khan Shia Imami Ismailia Association for Pakistan, 1984), 10-43; Shasu'l 'Ulama' U. M. Daupota, "A Dark Period in the History of Sind" Proceedings of the Pakistan Historical Records and Archives Commission (1954), 41-4; Abbas H. al-Hamdani, The Beginnings of the Isma'ili Da'wa in Northern India (Cairo: Dar Al Maaref, 1956); Gulshan Khakee, "The *Das Avatara* of Pir Shams as Linguistic and Literary Evidence of the Early Development of Ismailism in Sind" Sind Quarterly 7, 2 (1980), 44-7; Ansar Zahid Khan, "Ismailism in Multan and Sind" Journal of the Pakistan Historical Society 1, 22 (January 1975), 36-57; and Azim Nanji, The Nizari Isma'ili Tradition in the Indo-Pakistan Subcontinent (Delmar, New York: Caravan Books, 1978), 33-4.

²⁰Qahira, as it was then known, was roughly the same territory as Egypt.

²¹Engineer, The Muslim Communities of Gujarat, 25-26; Nanji, The Nizari Isma'ili Tradition, 4-5.

²²The Musta'li Isma'ilis remained a relatively unified religious and political force in Egypt, Syria, Yamen and elsewhere until 524/1130.

controversy over succession between supporters of al-Hafiz, al-Amir's cousin, and al-Tayyab, al-Amir's infant son. Al-Hafiz and his faction swayed the majority in Egypt. He therefore inherited the *Khalifa* and the power of the Fatimid *Khalif*. However, in 567/1171, the Fatimid *Khalifa* was ended with military defeat by Salah al-Din, and the Hafiziyya sect did not last much beyond its fall.

Al-Tayyab was recognized as the rightful successor by the Sulayhid dynasty in Yemen and a minority of Musta'ilian Isma'ili followers elsewhere. The Sulayhids ruled Yemen as nominal vassals of the Fatimids from 439-532/1047-1138. The followers of al-Tayyabi later sub-divided into Da'udi and Sulaymani factions.²³ The Sulaymanis can still be found in Yemen. Both Da'udi and Sulaymani sects left their respective religious legacies with their converts in India, the Bohras -- a community similar in many respects to the Khojas yet with different traditions of inheritance and religious practices.²⁴

By contrast, those Isma'ilis who sided with Nizar in the post-487/1094 succession believe a different account of events following Nizar's revolt against his brother, al-Musta'li. The Nizaris believe that Nizar escaped from Egypt and fled to the fort of Alamut in Persia. They also believe that Nizar had a son, 'Ali al-Hadi, born in Cairo in 470 A.H.. His son is said to have also traveled to the fort of Alamut with his mother and became the new Imam after the death of his father.²⁵ The Nizaris in Persia were able to form an independent political and

²³See Clifford, *The Islamic Dynasties*, 71-3. Regarding their official support of the Tayyabi's, see Daftary, *The Isma'ilis*: 256, 282, 284. For the main doctrinal differences between the Da'udi and Sulaymani factions, their organization, the relationship between their leaders and followers, including information on converts, see Daftary, *The Isma'ilis*, 303-23.

²⁴A person, known as Ahmad, was responsible for Musta'li conversions among different groups of North Western trading communities, leading to the formation of the Bohra community. The Bohras consider themselves Isma'ilis, but have much stronger links to mainstream Islam and are quite distinct from the Khojas and other Nizari Isma'ilis. For a more thorough study of modern developments amongst Bohras see: Engineer, *The Muslim Communities of Gujarat*; and also Engineer, *The Bohras* (New Delhi: Vikas, 1980). For more specialized issues relating to the Bohras see: H. M. Fakhr, "*al-Tarjamatu'z-zahira*. An Anonymous Tract on the History of the Bohoras" *Journal of the Bombay Branch of the Royal Asiatic Society N.S.* 16, (1940), 87-98; Dewan Bahadur K. M. Jhaveri, "A Legendary History of the Bohoras" *Journal of the Bombay Branch of the Royal Asiatic Society N.S.* 9 (1933), 37-52; S. T. Lokhandwalla, "The Bohras, a Muslim Community of Gujarat", *Studia Islamica*, 3 (1955), 117-35; and Theodore P. Wright, "Competative Modernization Within the Daudi Bohra Sect of Muslims and its Significance for Indian Political Development" in *Competition and Modernization in South Asia*, 151-78, Helen E. Ullrich, ed., (New Delhi, 1975). Of particular relevance to the topic of this thesis is: Rehana Ghadially, "Women and Personal Law in an Isma'ili Shi'ah (Da'udi Bohra) sect of Indian Muslims" *Islamic Culture* 70, 1 (January 1996), 27-51.

²⁵Engineer, *The Muslim Communities of Gujarat*, 35-6.

military *da'wa*, based on the confederation of Isma'ili cells that had been established under the earlier Fatimid *da'wa*. This community is represented, or misrepresented, depending on one's perspective, by orientalist scholars as the famous Assassins.²⁶ The Alamut state lasted nearly two hundred years before it was destroyed in 1256 by the Mongols.²⁷

The loss of overt political control by the Nizari Isma'ilis of Persia had several implications for the community. The confrontation that the Nizari state generated and the religious antipathy it aroused in orthodox circles led to their rejection by most of the Muslim world. In response, the religious orientation became very inward, with aspiration directed more towards devotion to the Imam than the formation of a Nizari state.²⁸ For the most part, the Nizari Imams went into hiding and, due to tremendous persecution directed at these Isma'ilis, a doctrine of *taqiya* evolved. Under *taqiya*, Nizari Isma'ilis have not only the right but the duty to protect their 'true' religion by a practice of dissimulation -- a practice which led to the outward adoption of cultural and religious practices of whatever dominant culture or religion they found themselves amongst. Internally, they were to have, above all, allegiance to their spiritual leader, follow his precepts and the traditions of Nizari Isma'ilis. It was also from this point that the *Imamate* went into hiding and at times even the Imam was said to have lied about his identity as the true inheritor of the Prophet's word and leader of the faithful.²⁹

A last doctrinal innovation which radically changed the nature of this sect of Nizari Isma'ilis occurred after the Qasim-Shahi - Mu'imi schism.³⁰ The Qasim-Shahi Nizari Isma'ili Imam, Hasan II 'ala *Dhikrihi al-Salam* (d.561/1166), declared in 1164 the spiritualization of the *shari'a*, or *qiyama*, and an abolition of its prohibitions.³¹ With this, he gave ultimate

²⁶For an example of Orientalist literature on the Assassins, which was available to and used by the Judges and lawyers during the period in which the Khoja court cases were heard, see: Joseph Von Hammer-Purgstall, *The History of the Assassins. Derived from Oriental Sources*, Trans. Oswald Charles Wood (London: 1835; New York: B. Franklin, 1968). Other publications on the Assassins include: Edward Burman, *The Assassins. Holy Killers of Islam* (London: Crucible, 1987); Ida Marie Frandon, "Assassins" et "Danseurs Mystiques" dans une enquete aux pays du Levant de Maurice Barres (Geneve: Droze, 1954); Marshall G. S. Hodgson, *The Order of the Assassins: The Struggle of the Early Nizari Isma'ilis Against the Islamic World* (New York: AMS Press, 1980); Bernard Lewis, *The Assassins: A Radical Sect in Islam* (London: Weidenfeld & Nicolson, 1967); Freric Prokosch, *The Assassins* (London: Harper & Brothers, 1936).

²⁷Nanji, *The Nizari Isma'ili Tradition*, 44.

²⁸Nanji, *The Nizari Isma'ili Tradition*, 44.

²⁹Hollister, *The Shi'a of India*, 108-9.

³⁰This innovation applies only to Qasim-Shahi Nizari Isma'ilis, a later schism between those who chose Qasim-Shahi over Muhammad-Shahi. For further information on the Qasim-Shahi - Muhammad-Shahi schism, see Daftary, *The Isma'ilis*, 446-8, 490-1.

³¹*Qiyama* literally means resurrection, and in this sense is interpreted to be the "completion of the

authority to the Imams: “Knowledge of God is the knowledge of the *Imam* of the time. ... His work is the word of God.”³² Thus Nizari Isma’ilism was freed of many Islamic restraints and orthodoxies. Everything from the Five Pillars of Islam³³ to religious law could therefore be interpreted by esoteric exegesis. This permitted each Imam to lead the community in whatever direction he chose, allowing him great flexibility in responding to current conditions. It also strengthened the role of the leader in a time when efforts to form an overt Isma’ili community, a state, had been thwarted. It served as a buffer against hostile orthodox Muslim opinion, as the faithful could feel confident that the pronouncements of their leader reflected the real word of Allah.³⁴

Conversion of the Khojas

The way in which the Khojas were converted and the legacy left to them by their missionaries, Pir Satgur Nur and Pir Sadr al-Din is key to their cultural, religious and legal position in the early nineteenth. Only a brief overview of the relationship between the Imam and the Khojas from their conversion to the eighteenth century is presented below. Few records for that period exist and it was evident that the community was able continue to function relatively independently until then. While it is informative to know what was occurring in the Isma’ili centre, as outlined above, it is important to not impose this history wholesale on the Isma’ili periphery, which functioned with considerable autonomy.

Pir Satgur Nur

The figure of Pir Satgur Nur, the “teacher of true light”,³⁵ also known as Nur al-Din, world, the end of the primacy of the Shari’a, the initiation of a new era in which priority is given to the spiritual life of the soul.” Françoise Mallison, “Hinduism as seen by the Nizari Isma’ili missionaries of Western India: The evidence of the *ginan*” in Hinduism Reconsidered, 93, Günther D. Sontheimer and Hermann Kulke, eds., (New Delhi: Manohar, 1989).

³²As quoted in Annmarie Schimmel, Islam in the Indian Subcontinent (Leiden: E. J. Brill, 1980), 72.

³³The five main principles or ‘pillars’ of Islam are: faith (*iman*) or article of faith (*kalima*), prayer (*namaz*), alms giving (*zakar*), fasting (*roza*) and pilgrimage (*hajj*). Alka Singh, Women in Muslim Personal Law (New Delhi: Rawat Publications, 1992), 17, 124.

³⁴Nanji, The Nizari Isma’ili Tradition, 44.

³⁵The Sanskrit translation of the name is: *sat* (true) and *guru* (master). Frank Conlon suggests that the adoption of this name was typical of the “exercise of synthesis which apparently most Ismaili missionary activities included.” Frank F. Conlon, “The Khojas and the Courts” (unpublished M.A. thesis,

was said to be the first official Nizari missionary active in India.³⁶ There are many versions of Satgur Nur's origins and his activities in India. Some sources suggest that he was sent by Imam al-Mustansir Billah to India and his task was to preach in favour of the Imam's eldest son, Nizar.³⁷ Other sources suggest that he was active much later, during the time of Hasan II 'ala Dhikrihi al-Salam, the Nizari Imam of the Alamut period who ruled from 1162-1166 and released the Imams from the authority of the *shari'a*.³⁸ Pir Satgur Nur is reputed to have been responsible for converting two Hindu rulers³⁹ and to have performed many miracles. One of these Hindu rulers, King Soor Chand of Dhara Nagar, was said to have been so entranced by Pir Satgur Nur's beautiful voice, appearance, words and manners that he married his daughter, Palan De, to the missionary, thus cementing their ties.⁴⁰ By all accounts, Pir Satgur Nur must have been a remarkable man. He has left a legacy of religious poetry, *ginans*,⁴¹ which he composed and chanted to preach to the communities he encountered. These *ginans* were written in Sindhi, Gujarati and Hindi. He was also known to chant to his Indian audience in Arabic from the *Koran*.⁴²

The Hindu milieu was central to the version of Isma'ilism that Satgur Nur preached.⁴³ The concept of Isma'ilism which he espoused was rooted in Hinduism as he accepted the avatars of Vishnu, yet proclaimed that they were not the whole truth. He suggested that there was a tenth avatar, the Most Holy Ali, who was the one who showed the

University of Minnesota, 1963), 9.

³⁶It is believed that Pir Satgur Nur was sent by the Nizari Isma'ili *da'i* from Daylaman and was first active in Gujarat. Daftary, *The Isma'ilis*, 415.

³⁷See above, page 28, for more information regarding Al-Mustansir Billah, who ruled from 427-487/1035-1095. Nanji, *The Nizari Isma'ili Tradition*, 57.

³⁸Nanji, *The Nizari Isma'ili Tradition*, 57-8.

³⁹One ruler he is said to have converted was the Hindu King of Gujarat, Siddharaja Jai Singh (or Siddharaj Jay Simha) was thought to have ruled from 1094-1143. The other was the ruler of Dhara Nagar, Soor Chand. Daftary, *The Isma'ilis*, 415 and F. Mallison, "Hinduism as seen by the Nizari Isma'ili missionaries of Western India", 94.

⁴⁰Allana, *Ginans of Ismaili Pirs*, 49.

⁴¹Allana, *Ginans of Ismaili Pirs*, 41-3, 109-19.

⁴²Allana, *Ginans of Ismaili Pirs*, 47-52.

⁴³It is important to note that Hinduism at this time was being transformed and challenged. The previous reliance on the authority of the Brahmins, and through them the scriptures, the *Vedas* and the *Puranas*, was being challenged by the Bhakti movement. Hence one can argue that in such a climate of questioning and criticism, an Isma'ili missionary could more readily find people willing to listen to, and even convert to, a quite different understanding of Hinduism which then was linked to a particular form of Islam.

way to the Islamic faith. The 'Ali he spoke of was the son-in-law of the Prophet Muhammad and was the door into the Shi'a Islamic tradition. With 'Ali accepted, the *silsilah* was introduced and the current Imam was known as the inheritor of 'Ali's spiritual authority.⁴⁴ His *ginans* clearly reflect the use of Hinduism yet also equally demonstrate the importance of the doctrines of Islam as demonstrated by:

Oh *momin*s, do not forget; the *Kalima* repeat;
The path of the Prophet and Ali as truthful treat.

In this world has been sent the Prophet's progeny;
The *Namaz* and *Kalima* will bring to you blessings many.

The *Kalima* was taught by the Prophet, the Guide;
Who believe will Paradise gain, others into error will slide.

Paradise has opened its window, and heaven its door;
The wise ones know; those astray will lament more and more.

Pir Sat Gur Noor says, "Do not foolish be;
Say the *Kalima*, and the Light of Paradise see."⁴⁵

These ideas were later expanded upon by his successor, Pir Shamsuddin Sabzwari Multani (b. 560/1165). Pir Shamsuddin was active in Uch and Multan, hence his being known as 'Multani', with Multan also being the site of his tomb, known locally as Shams-i Tabriz. He is credited with the conversion of thousands of Hindus to Islam, however some of these separated from the larger *da'wa* and became known as Shamsis, though they later recognized the Aga Khan as their spiritual leader.⁴⁶ In discussing Hindu idolatry, Islam, and the Nizari Isma'ili *silsilah*, Pir Shams sang:

These idols that you worship are a deception;
They are stone, merely a man's creation.

Worship God, who is One and the Creator;

⁴⁴Diamond Rattnasi, *Islamization and the Khojah Ismaili Community in Pakistan*, (M.A. Thesis, McGill University, 1983), 17.

⁴⁵This is an excerpt from one of his *ginans* as translated by G. Allana. Allana, *Ginans of Ismaili Pirs*, 111-9. Note the use of the *kalima*, one of the Five Pillars of Islam which can roughly be understood in English as "there is no God but Allah, and Muhammad is his Prophet." *Namaz*, prayer, is also one of the Five Pillars of Islam.

⁴⁶Shamsuddin was succeeded by his son and grandson, but little is known of their activities. Daftary, *The Isma'ilis*, 478-9 and Mallison, "Hinduism as seen by the Nizari Isma'ili missionaries of Western India", 94. For a look at Pir Shams's contribution to Indian Nizari Isma'ilism in the form of his *ginans*, see: Allana, *Ginans of Ismaili Pirs*, 53-6, 121-161.

Follow the rightful Path of the Master.

You must the latest *guru* accept;
And faithfully follow his precept.

His name is Muhammad, and hold to him fast;
He is a Prophet, among the Prophets, the last.

Mowla Murtaza Ali his successor;
Of Shah Nizar, the present Imam, an ancestor.⁴⁷

Pir Sadr al-Din

The third important missionary figure was Pir Sadr al-Din.⁴⁸ It has been suggested that he was a descendant of Muhammad b. Isma'il and that he was sent to India from Sabzawar, Khurasan, Persia by the Nizari Imam, Islam Shah (d. 829/1425-1426).⁴⁹ His father was also a Pir, Sahibal-Din, and his mother, Noor Fatima, was the daughter of a prominent resident of the Persian city of Sabzwari. He travelled by foot from Persia to India, visiting Sind, Punjab, Bhawalpur, Kutch, Gujarat and Kathiawar. He settled in Sind, yet also returned twice to Persia to meet with the Imam and bring tithes from the communities he had converted.⁵⁰

It was Sadr al-Din who was key to the conversion of the community now known as Khojas. He converted a number of Hindus of the Lohana caste to Isma'ili Islam. The Lohanas were regarded as Kshatriyas and were mostly occupied as traders.⁵¹ The word Khoja derives

⁴⁷ Allana, *Ginans of Ismaili Pirs*, 29.

⁴⁸ Pir Sadr al-Din was said to have been born in 700/1300. The date of death is disputed and has been placed somewhere between 770/1369 and 819/1416. Allana asserts that it was the latter and that Sadr al-Din lived to the ripe old age of 116 years! Daftary, *The Isma'ilis*, 479 and Allana, *Ginans of Ismaili Pirs*, 57-9.

⁴⁹ Daftary, *The Isma'ilis*, 452, 479.

⁵⁰ Allana suggests that Pir Sadr al-Din was even accorded the honour of dining with the Imam on one of his visits.

⁵¹ Frank Conlon speculates that the appeal of Isma'ilism for trading communities was that initially identification with Islam, made "palatable by the syncretic teachings of Ismaili *pirs*, probably seemed the best course for the Lohanas." And that at a later period in which "Ismaili doctrine proved inconvenient and low in Muslim social prestige," this affiliation could be abandoned, at first under the doctrine of *taqiya* and then openly, in favour of "more orthodox Sunni tenets." Conlon, "The Khojas and the Courts", 11. Hence it was a religion which could be adopted and adapted to changing circumstances, as best suited the needs of trade and status for the community members. Whether this was the case or not is beyond the scope of this study, however it is significant to note that Isma'ilism -- both eastern, Nizari, and western, Musta'li branches -- held considerable appeal amongst trading communities of Western India as is demonstrated by the conversion of communities like the Khojas and Bohras.

from the Persian *Khwaja*, meaning lord or master. It was used to address the Lohanas at the time Sadr al-Din first had contact with the community and there were traces of its continued usage by the Khoja community into the nineteenth century.⁵² It has since become an ethnic term used to designate the particular group of Lohana who converted to Nizari Isma'ilism. It is said that the appellation Khoja was given to new converts by Sadr al-Din who wished the new believers to be honored as befitted their new and old status.⁵³

The peculiar form of faith preached by Pir Sadr al-Din is seen in his use of Hinduism. He continued the use of Hindu religious imagery and accepted even more Hindu aspects than Satgur Nur. He too used *ginans* to preach to those who would listen and still today, these *ginans* are an important source of religious inspiration and solace.⁵⁴ However, his most lasting contribution was in the form of a sacred book, the *Das Avatar*, which accepted the nine avatars of Vishnu, characterized Vishnu as Adam, and the Prophet Muhammad as Brahma. The Prophet's daughter Fatima, 'Ali's wife, was seen as Shakti or Sarasvati. The Prophet Muhammad's son-in-law 'Ali was interpreted as the tenth avatar of Vishnu, with the soul of the final avatar continuously reincarnated in the current Imam.⁵⁵

Pir Sadr al-Din also adapted the Hindu religious symbol 'OM' to be used to symbolize 'Ali. Hindu surnames, dress and even life rituals were accepted and the converts were able to retain many other Hindu customs.⁵⁶ The Khoja community was also not required to fast for the month of Ramadan or pray like other Muslims. Instead they were to send tithes to the Imam, give their allegiance to him and recite litanies in front of his portrait.⁵⁷

Pir Sadr al-Din played a key role in the organization of the Nizari *da'wa* in India. He

⁵²Daftary, *The Isma'ilis*, 479, and Nanji, *The Nizari Isma'ili Tradition*, 45.

⁵³Nanji, *The Nizari Isma'ili Tradition*, 206.

⁵⁴Some of his *ginans* are translated into English in Allana, *Ginans of Ismaili Pirs*, 163-229.

⁵⁵Conlon, "The Khojas and the Courts", 11; Reginald E. Enthoven, *The Tribes and Castes of Bombay II* (Bombay: Government Central Press, 1922), 221-2, and Mallison, "Hinduism as seen by the Nizari Isma'ili missionaries of Western India", 95.

⁵⁶Mallison points out that the utilization of Hinduism was "not limited to points of doctrine but includes the borrowing of metaphors, literary forms and all the ritual and cultural practices, to such an extent that the content of the *ginan* becomes a witness of contemporary Hindu practices and beliefs." She goes on to assert that these Hindu practices were not merely an external appearance of Hinduism, and that the *ginans* provide proof of "real elements of Hindu doctrine." Mallison, "Hinduism as seen by the Nizari Isma'ili missionaries of Western India", 95, 99 fn 5. Other interpretations of the relationship between Hinduism and Khoja beliefs abound, including court testimony and the musing of the various lawyers and judges involved in Khoja court cases.

⁵⁷Engineer, *The Muslim Communities of Gujarat*, 38.

built the first Nizari *jama'at khana*, the community assembly or prayer hall, located in Kotri, Sind. Next, he built more *jama'at khana*s in the Punjab and Kashmir. He spread the Nizari message further with his extension of the *da'wa* into Gujarat. In each region he appointed a community leader, or *Mukhi*, who was also responsible for the collection of tithes to be forwarded to the Imam in Persia. These centers formed the basis of the Nizari community in India.⁵⁸

In India the Khojas went from an early conversion/missionary phase to a period of consolidation and institution building.⁵⁹ The relationship was not without controversy and underwent several transformations and reorganizations throughout its history, however it was characterized by continued loyalty by the Khojas to the Imam.⁶⁰ With the collapse of the Isma'ili state in Alamut, sustaining ties between the Imamate and the Khoja followers in India became increasingly difficult. As a result, considerable autonomy developed in areas like India. However, despite the hardships and dangers involved, the Indian members of the *da'wa* continued to make pilgrimages to their Imam in Persia and deliver the religious tithes.⁶¹ The leaders of the Nizari Isma'ili sect also irregularly sent representatives to his followers in India.⁶² This situation began to change in the eighteenth century as the bonds between the Imam and his followers began to strengthen when the Imamate moved closer to his Indian followers. When the Imamate in Persia became increasingly embroiled in dynastic disputes with the Saffavids, the support from the community in India, particularly financial, was crucial to the future of the Imamate.

⁵⁸Daftary, *The Isma'ilis*, 479. As testimony in the Aga Khan case later demonstrated, the administrative structure laid out by Pir Sadr al-Din remained virtually unchanged.

⁵⁹Nanji, *The Nizari Isma'ili Tradition*, 70.

⁶⁰The most significant schism within the Lohana (Khoja) converts were those known as Imam-Shahi's or Satpanthi, who split from the central Isma'ili *da'wa*, by choosing to follow Nur Muhammad Shah (d. 940/1533-1534), son of Imam Shah, youngest grandson of Pir Sadr al-Din through his son, Hasan Kabir al-Din, the representative of the *da'i* in Gujarat. Sometime in 919/1513, Nur Muhammad, was able to successfully convince many Nizari followers to deliver all tithes to him directly in Gujarat as opposed to sending the *dassondh* through Sind to the Imam in Persia. These claims were rejected by a key Kheta, who was the *mukhi* of approximately 18,000 converted Lohanas, and other Nizaris of Gujarat who remained loyal to the Nizari Imams and central *da'wa* in India. Daftary, *The Isma'ilis*, 481 and Mallison, "Hinduism as seen by the Nizari Isma'ili missionaries of Western India", 94. For more details on the Imam-Shahi or Satpanthi sect, see: Nanji, *The Nizari Isma'ili Tradition* and Wladimir Ivanow, "The Sect of the Imam Shah in Gujarat" *Journal of the Bombay Branch of the Royal Asiatic Society* N.S. 12, (1936), 19-70.

⁶¹Nanji, *The Nizari Isma'ili Tradition*, 87.

⁶²Though, as F. Mallison point out, this was more on "an administrative rather than a missionary basis." Mallison, "Hinduism as seen by the Nizari Isma'ili missionaries of Western India", 94.

The Imamate and India

The relationship between the Aga Khan and the Khojas was highly contentious in the nineteenth century. Disputes came before the colonial courts, and at times feelings ran so high that there was violence resulting in murders. The outcome was the firm exertion of control by the Aga Khan and his successors over the majority of Khojas with some abandoning Aga Khani Nizari Isma'ilism for Ithna 'Ashari Islam or Sunni Islam. While the specific cases which concerned Khoja female inheritance will be examined in detail in the following chapters, it is important to note the overall issues at stake. These concerns invariably played into whatever dispute arose, be it within the family or community, and were responsible for the failure of efforts to create legislation to help govern and resolve conflicts over inheritance and succession.

One of the most important demonstrations of both Khoja loyalty and protest against their spiritual leader was the giving of tithes. The Aga Khan I (d. 1298/1881), his father (d. 1232/1817), and his grandfather (d. 1206/1792), all received financial support from the Khoja community -- support which enabled them to pay for their own and their entourages' upkeep, raise armies, and overall elevate their status first in Persia then in India. The Aga Khan I's grandfather, Imam Abdu'l-Hasan 'Ali Shah, received a yearly tribute from India, estimated at 20,000 *tumans*, which supported a lavish lifestyle in the city of Kirman and the acquisition of property in the province.⁶³ The security of his position was demonstrated when he was able to continue ruling the province of Kirman even when the Persian Zand dynasty⁶⁴ disintegrated after the death of Karim Khan in 1799.

The Aga Khan I's father, Imam Shah Khalil Allah III, transferred the Imamate from Kirman east to its former seat at Kahak soon after his succession in 1206/1792. Later, in 1230/1815, he moved the headquarters to Yazd, between Isfahan and Kirman, and even closer to India, on the route to Baluchistan and Sind. Most scholars speculate that the move to Yazd was largely motivated by a desire to have better access to and communication with his

⁶³Hamid Algar goes so far as to suggest that the popularity of Imam Abdul Hasan Shah was based on the financial support of Indian Isma'ilis. Hamid Algar, "The revolt of the Agha Khan Mahallati and the transference of the Ismai'ili Imamate to India" *Studia Islamica* 29 (1969), 58.

⁶⁴The Zand dynasty lasted in Persia from 1163-1209/1750-1794. For a brief history of this dynasty see: Bosworth, *The Islamic Dynasties*, 177-8.

followers in India.⁶⁵

Shah Khalil Allah was favoured and protected by the second Persian Qajar ruler, Fath 'Ali Shah (d. 1212/1797).⁶⁶ It has been suggested that this was largely because of the quite considerable tithes brought to Persia by his Indian followers, mostly from Khojas.⁶⁷ At times the burden of making such large payments caused hardship and sacrifices, as is evidenced by the need to mortgage the Bombay *Jama'at khana* in order to meet his demand for a tribute of Rs 17,000.⁶⁸ There were also rumours that he had converted the Qajar Monarch to Isma'ilism.⁶⁹ While this does not appear to have been the case, Shah Khalil Allah III's importance as the Imam of the Nizari Isma'ilis incurred the intense dislike of the Ithna 'Ashari 'ulema who spoke out strongly against his heretical views and pretensions as the descendant of the Prophet Muhammad. These feelings came to a head in Yazd in 1232/1817, when a fight broke out between some Nizaris and local shopkeepers in the market. When the Nizaris took refuge in Shah Khalil Allah's residence, an Ithna 'Ashari Mulla, Hasayn Yazdi, brought together a large group of men and attacked the Imam's house. The Imam and most of his followers were killed, including an Indian who was there making a pilgrimage.⁷⁰

Shah Khalil Allah III was succeeded by his eldest son, Muhammad Hasan, also known as Hasan 'Ali Shah, the first Aga Khan (1219-1298/1804-1881).⁷¹ Hasan 'Ali Shah

⁶⁵Hamid Algar, "Aqa Khan" *Encyclopaedia Iranica*, (London: Routledge & Kegan Paul, 1987), 170 and Daftary, *The Isma'ilis*, 503-4.

⁶⁶For a brief overview of the Qajar Dynasty see: Bosworth, *The Islamic Dynasties*, 179-80.

⁶⁷Records of demands for tithes can be found in a number of letters from the Aga Khan to his followers. One letter, addressed to his followers in Bhownuggur on the 23 May 1792 requests that his followers send money to him, as their Pir, in care of the *jama'at* at Muscat "as usual". A later letter, dated July 1794, asks that his followers in Sind, Kutch, Bombay, Mahim, Bhownuggur and other places remit a fixed stipend at the end of every month, "[a]s all of them are faithful, and well wishers of their sircar - 'Sircar Sahebi' being the title of the Pir and the name in which the accounts between him and the Jumats are kept." In 1806 and 1807 the Bombay *jama'at khana* account books clearly recorded tributes to Shah Khalil Allah, as their Pir Salamut. See the evidence as recorded in Edward Irving Howard, *The Shia School of Islam and its Branches, Especially that of the Ima'ec Ismailies: A Speech Delivered in the Bombay High Court in June 1866* (Bombay: Education Society, 1895), 85.

⁶⁸The Bombay *jama'at khana* account books indicated that Rs 1300 was sent to Shah Khalil Allah. Howard, *The Shia School of Islam*, 86. In approximately 1804 the Khoja's in Bombay had to mortgage the *jama'at khana*, at high interest, to a Bombay *shroff* for the sum of Rs 17,000. *Bombay Times and Journal of Commerce* [hereafter *BT*] (21 July 1851), 1033-4.

⁶⁹Hamid Algar argues that these rumours were baseless and states that: "[they] arose simply from this one instance of Fath 'Ali Shah's general tendency to seek the favor of holy men, whether orthodox or heterodox." Algar, "The revolt of the Agha Khan Mahallati", 60.

⁷⁰Daftary, *The Isma'ilis*, 503-4.

⁷¹Algar, "Aqa Khan", 170.

and his mother, reputed to be a woman of considerable intelligence and vigorous character, had remained in Kahak when Shah Khalil Allah III had moved the Imamate to Yazd. When a dispute arose over the proceeds of the family holding in the Mahallat area, they had to leave for Qumm and lost the rights over their land. Hasan 'Ali Shah was only thirteen when his father was killed and he became the next Imam. The strength and persistence of his mother's pleas to the Qajar monarch, Fath 'Ali Shah, led to the restoration of the lands in Mahallat and the punishment of his murderers. In addition, Hasan 'Ali Shah was married to one of the Monarch's daughters, Sarv'i Jahan Khanum, and made governor of Qumm.⁷² The honorific title "Aga Khan", which all later Imams have retained, was given to him by the Persian monarch at this time.⁷³

During the reign of Fath 'Ali Shah, the Aga Khan I held an influential position within the Qajar court. He was also able to acquire a personal military force, largely funded by tithes from Indian followers. With the succession of Fath 'Ali Shah's grandson, Muhammad Shah, in 1250/1834, he was appointed the governor of the province of Kirman. He soon quelled a rebellion there which was headed by the sons of Shaja' al-Saltana, 'pretender' to the Qajar throne. The Imam expected to be compensated for militarily bringing Kirman under control and to receive further royal favours, as was customary.⁷⁴ Instead, after two years, he was dismissed from his position as governor of Kirman and recalled to Tehran.⁷⁵ He refused to leave and instead fortified his forces at the Kirman citadel at Bam. There his brothers joined

⁷²According to Ahmad Mirza 'Azod-al-dawla [in *Tarik-e 'Azodi*, as translated and paraphrased in Algar, "Aqa Khan", 170.], these privileges were due to the services of his father in the establishment of the Qajar dynasty. It is also significant that at the time of the marriage, the Aga Khan rebuked his followers in India for not providing adequate financial compensation. The letter, dated December 27, 1820, was addressed to the Khoja *jama'ats* in Sind, Bombay, Kutch, Surat and other places. According to Howard's paraphrasing of the letter, it stated that "the Kamaria will deliver to the Jamats the letter of the Sircar and inform them respecting the one tenth grants, that were asked in aid of the Sircar's marriage gifts to the King of Kings [the Shah of Persia]. He also says that the dues hitherto paid, have not been sufficient or equal to the proper amount. ... [It goes on to state that] the dues were to be paid at the end of three months." Howard, *The Shia School of Islam*, 85-6.

⁷³Algar, "The revolt of the Agha Khan Mahallati", 61-2 and Daftary, *The Isma'ilis*, 504-5.

⁷⁴The Aga Khan did not accept advance payment from the Qajar Monarch for pacifying Kirman, and stated that he would accept any reward the Monarch saw fit after his successes. However, it was clear that after notifying the Monarch of his success, accompanied with all tax arrears from the province, he was expecting to receive a Royal favour -- likely the Governorship of Kirman and the resolution of certain grievances. Algar, "The revolt of the Agha Khan Mahallati", 63-5.

⁷⁵The governorship of Kirman was given to Firuz Mirza, a Qajar Prince. For an examination of the Qajar court intrigues and Sufi aspects of the decision to dismiss the Aga Khan, see Algar, "Aqa Khan" *Encyclopaedia Iranica*, 170.

him and together they were able to withstand the Qajar forces for fourteen months.⁷⁶ With his forces depleted, his brother Muhammad Baqir Khan imprisoned, and little hope of holding out any longer, the Aga Khan appealed to the governor of Fars, Firudin Mirza, to intervene on his behalf. This intercession spared the Imam's life, but little else, as his possessions were seized and he and his dependents were held prisoner in the city of Kirman. During the eight months he was held there, only depositions of tithes from Badakhshan, Khurasan, and India helped offset his devastating losses.⁷⁷

As court politics changed, the Aga Khan I was able to plead his case before the Qajar monarch. He was pardoned on condition that he retire to his family lands at Mahallat. He did this for two years at which time court rumors suggested that he was again mustering men and equipment to launch a new revolt. While the Aga Khan denied such charges as stemming from his refusal to marry one of his daughters to the son of a rival in court, he did possess five hundred horses and a mercenary army of Nizaris and non-Nizaris.⁷⁸ On the pretence of going on a pilgrimage to holy Shi'a sites, he headed with his army to Yazd in hopes of regaining the governorship of Kirman by force in 1256/1840.⁷⁹ After initial successes, the Aga Khan was defeated. He then chose to flee to India overland through southern Khurasan to Afghanistan.⁸⁰

In Afghanistan, the Aga Khan forged a relationship with the British which was key to his later support of and from the British powers in India. It has been suggested that there was contact prior to the Aga Khan's assistance of the British in Afghanistan. The timing of his revolt against the Qajar's coincided with Persian advancement on Herat -- an action which was partially responsible for the British attack on Afghanistan in 1838. Certainly, the British Minister in Tehran, McNeill, noted the Aga Khan's revolt with approval in his dispatches to

⁷⁶His brothers, Sardar Abul Hasan Khan and Muhammad Baqir Khan, had been campaigning against the Baluchis at Bampur and Rawar. Algar, "The revolt of the Agha Khan Mahallati", 65.

⁷⁷Algar, "The revolt of the Agha Khan Mahallati", 65-6 and Daftary, *The Isma'ilis*, 506.

⁷⁸The rival was 'Abdul-Muhammad Mahallati -- a man who had been a peasant on Aga Khan's family lands at Mahallat but had obtained prominence in the Qajar court through his Sufi connections. Insulted by the pretensions of his former peasant, the Aga Khan categorically refused to ally himself through marriage with 'Abdul-Muhammad Mahallati. Several accounts highlight the malice and intrigues of 'Abdul-Muhammad Mahallati after the Aga Khan's refusal. See both Algar, "The revolt of the Agha Khan Mahallati", 66-7 and Algar, "Aqa Khan", 170.

⁷⁹The Aga Khan clearly demonstrated this motivation by having forged documents prepared which granted him governorship of Kirman. Algar, "The revolt of the Agha Khan Mahallati", 67.

⁸⁰For a more detailed account of various the battles, see: Algar, "The revolt of the Agha Khan Mahallati", 67-71 and Daftary, *The Isma'ilis*, 507-9.

Lord Palmerston. More tangible evidence is suggested by an account which states that cannons captured from the Aga Khan during his revolt against the Qajars had British markings. It also seems likely that he was acquainted with Major Rawlinson, the Governor of Qandahar, which was the first place he went to after crossing the Afghan border.⁸¹ However, in Afghanistan, it was clear that the Aga Khan provided direct aid to the British with their annexation of Sind, rendering crucial assistance to the British commander, Charles Napier, and also providing military support during the second Afghan war.⁸² For these services, he was awarded a pension by the British and given the rank of an hereditary prince. Now he was recognized not only as the head of a religious community but also as royalty by both the Persians and the British.

In Ramadan 1260/October 1844, the Aga Khan I left Sind for Bombay, via Karachi. Along the way he spent time with his followers, spending a year at centers like Kathiawar where he was “welcomed with veneration and respect and loaded with presents.”⁸³ His arrival in Bombay in Safar 1262/February 1846⁸⁴ has been described as follows:

The Aga came to Bombay like a Pope driven from Rome to Avignon. Here he was received with great distinction by all the Khojas... as the recognized religious chief of the community. He at once led the mourning in the Jamat Khana during the Mohurram, in the Shia form; he held his Durbar at which all Khojas attended and kissed his hand.⁸⁵

However, soon after his arrival he was also greeted by a Persian demand for extradition, according to the Anglo-Persian Treaty of 1229/1814. Given the crucial support the Aga Khan had provided in Afghanistan, the British refused to comply. Their compromise was

⁸¹ Algar, “The revolt of the Agha Khan Mahallati”, 75-6.

⁸²For further accounts of the Aga Khan’s activities in Afghanistan, see: Sultan Muhammad Shah Aga Khan, The Memoirs of the Aga Khan: World Enough and Time (London: Cassell and Company Ltd., 1954), 69, 182; Algar, “The revolt of the Agha Khan Mahallati”, 76-9; and H. T. Lambrick, Sir Charles Napier and Sind (Oxford: Clarendon Press, 1952), 157-60.

⁸³Telegraph and Courier [TC] (21 July 1847), according to J. C. Masselos, “The Khojas of Bombay: The Defining of Formal Membership Criteria during the Nineteenth Century” in Castes and Social Stratification among Muslims in India (New Delhi: Manohar, 1978), 106, fn 25. Unfortunately, I was unable to access the 21 July 1847 TC as it is missing from TC microfilms available in North America. I was also unable to locate it in India.

⁸⁴This date has been suggested by Farhad Daftary. Another date of arrival has been given, Muharram 1262 / December 1845-January 1846, by Hamid Algar. Algar, “The revolt of the Agha Khan Mahallati”, 79.

⁸⁵Howard, The Shia School of Islam, 98-9.

to send the Aga Khan to Calcutta where he would be less likely to launch new activities against Persia.⁸⁶ Meanwhile, the Aga Khan requested that the British plea on his behalf for his return to Persia as he continued to hope for the restoration of his lands and power. Eventually in Safar 1263/February 1847, his case was accepted by the Persian monarch provided that he would avoid travelling through Baluchistan and Kirman, where it was feared that he would launch anti-government activities, and settle peacefully in Mahallat.⁸⁷ Before he could do this, the Qajar monarch, Muhammad Shah, died and his successor reversed the earlier decision. The new Qajar leader, Nasir al-Din Shah (d. 1264/1848), declared categorically that the Aga Khan would be arrested at the Persian border as a fugitive. After several attempts to change Nasir al-Din Shah's position, the Aga Khan gave up and settled permanently in Bombay.⁸⁸

With the transference of the Imamate to Bombay, the entire relationship between the Aga Khan and his Khoja followers was altered, both in terms of the financial arrangements and his authority over the community. While previously tithes were sent irregularly, direct access made payment both easier and more compelling. With these resources, the Aga Khan was able to establish elaborate headquarters and residences in Bombay, Poona and Bangalore. He was also able to sponsor several relatives in Persia and facilitate their joining him in India. Soon his court attendants and servants increased to 1,000 people, supported in large part by the tributes from the Khoja community.⁸⁹

In terms of religious and community issues, the Aga Khan began to participate directly in the community councils and take an active role in the appointment of officials to each *jama'at khana*. The structure of administration remained much the same as had been introduced by Pir Sadr al-Din. It consisted of a federation of cells, each with a single *jama'at*, or community, at its base. Each council was comprised of all the adult males in each *jama'at* with decisions regarding community affairs made in meetings at the council-hall, the *jama'at*

⁸⁶The move to Calcutta was reputed to have been highly "distasteful" to Aga Khan for a variety of reasons. *TC* (5 August 1847), 808.

⁸⁷It has been suggested that these conditions were unacceptable to the Aga Khan and that he delayed his return to Persia deliberately, hoping that a different agreement could be made. Hence one can conclude that he still held aspirations to control these territories.

⁸⁸As late as 1868, the Aga Khan sent gifts of three elephants and a rhinoceros to the Qajar Shah in the hopes of pardon. Daftary, *The Isma'ilis*, 512-3 and Algar, "The revolt of the Agha Khan Mahallati", 80-1.

⁸⁹Daftary, *The Isma'ilis*, 513.

khana. For each *jama'at khana* there was a treasurer or steward, the *Mukhi*, and the accountant, the *Kamaria*. While their key responsibility was to collect and forward the tributes for the Imam, they also held a position of leadership with the *Mukhi* being the local head of the *jama'at* and the *Kamaria* his assistant.⁹⁰

Essentially what the Aga Khan faced was a community that had been, by and large, content and loyal from afar, but was not accustomed to either close control or scrutiny. Prior to the arrival of the Aga Khan, the Khoja community was able to lead their lives and community affairs quite independently. As was noted with the initial conversions under Pir Sadr al-Din, many Hindu elements had been incorporated into the missionary message. In India, the doctrine of *taqiya* was embraced as a means to blend into the wider ethos, be it Hindu or Muslim. The continuation of pre-Nizari Isma'ili Hindu customs was therefore not challenged, nor was the adoption of Sunni practices, however, these traditions had begun to change even before the Imam arrived in India.

Early Tensions Between the Aga Khan and the *Barbhai*

By the early nineteenth century there was already an increasing emphasis on Sunni Islam among some of the more prosperous Khoja merchants in Bombay. The construction in 1822 of a Sunni mosque by the Bombay *jama'at* in the old Khoja burial-ground, was an outward expression of the ambiguous relationship the Khoja community had with Sunni Islamic practices.⁹¹ The mosque was built to serve the religious needs of the Khoja community whose customary practise was to marry according to Sunni rites and under Sunni religious authority. The maintenance and the salary of the Sunni religious personnel of the Mosque were paid by the *Mukhi* and *Kamaria*, supposedly on behalf of the Aga Khan. While few Khojas prayed regularly in this, or any other Sunni mosques, and instead conducted their day to day religious life at their *jama'at khana*, certain members of the emerging merchant/business elite did.⁹² Such an action demonstrated a willingness to move

⁹⁰Asaf A. A. Fyzee, Cases in the Muhammadan Law of India and Pakistan, (Oxford: Oxford University Press, 1974), 526.

⁹¹The mosque was dedicated as Sunni, but did not bear any of the inscriptions normally found on Sunni mosques regarding the first three *Khalifs*. C. Dobbin, Urban Leadership in Western India (Oxford: Oxford University Press, 1972), 114.

⁹²As Judge Arnould relates in the Aga Khan Case (1866): “[the dissenters] -- the wealthy Khojas of

away from their then distant Imam, and towards the more mainstream form of Islam found in India.⁹³

Seven years after the construction of this Mosque, the first refusal to contribute the customary tithes to the Imam occurred. What role the Sunni leader of the mosque had in this decision is not clear, however, it was a departure from previous practises.⁹⁴ The dissidents argued that they were motivated by a wish to excise “ancient superstitions” from Khoja beliefs and replace them with the “orthodox” Sunni teachings.⁹⁵ It is also clear, however, that they were strongly motivated by monetary concerns as the Aga Khan’s demands were quite substantial and ever increasing. The Khoja community of Bombay had only just paid off the mortgage which had been taken out to raise funds for the Aga Khan’s father.⁹⁶

The Aga Khan I initially sent several letters to the community from Persia demanding payment, and in one stated that certain *jama'ats* had “transgressed his rights” and that he would “not allow it.”⁹⁷ In 1828-1829, when this proved unsuccessful, he sent his maternal grandmother, Marie-Bibi,⁹⁸ an “energetic” and formidable woman, accompanied by Mirza Abdul Qassim, to resolve the matter. Marie-Bibi spoke in the Bombay *jama'at khana* rebuking the disputants.⁹⁹ By this point, the Aga Khan demanded a sum of Rs. 100,000 and 12.5% of all Khoja business profits.¹⁰⁰ A suit was filed against the dissidents in the Bombay High

Bombay who for a couple of generations or so have adopted the respectable and orthodox faith of the Sunnis -- they, indeed, habitually frequented this mosque for the purposes of religious worship.” Fyzee, Cases in the Muhammadan Law, 543.

⁹³Fyzee, Cases in the Muhammadan Law, 542-3.

⁹⁴While there were previous instances when the tributes were sent irregularly, this was more often than not due to the difficulty involved in transferring the funds to the Imam. Although the Imam’s position in the Qajar Court fluctuated, there were many examples of the tributes successfully reaching the Imam in the early 1820s.

⁹⁵Dobbin, Urban Leadership, 118-20.

⁹⁶This was not the only case where the community had to mortgage property at high interest to meet their Imam’s demands. In 1846, two houses at Mahim had to be mortgaged to raise the Rs 3,100 demanded. BT (21 July 1851), 1033-4.

⁹⁷In March 1824, the Aga Khan demanded one fifth of all profits from Khoja businesses. In October 1825, he admonished the Khoja *jama'ats* for not sending their tributes, as expected. A month later, he referred in a letter to the regular accounts between himself and the *jama'ats* and stated that he had appointed someone to look into the matter and adjust the accounts to reflect the proper dues. It was clear that by September 1826, all payments from the Bombay *jama'at khana* stopped. Howard, The Shia School of Islam, 86-7.

⁹⁸Marie-Bibi left a lasting impression on the Khoja community. All later accounts of these events in testimonies before the courts regarding other matters, indicate her significant role.

⁹⁹Mujtaba Ali, The Origin of the Khojahs and their Religious Life Today (Würzburg: Buchdruckerei Richard Mayr, 1936), 45.

¹⁰⁰Masselos, “The Khojas of Bombay”, 104-5.

Court, but was withdrawn a year later. While there is some debate as to what extent the Aga Khan was aware of the move to engage the British legal system in the dispute, he did, nonetheless, invest Marie-Bibi and Mirza Abdul Qassim with his full authority.¹⁰¹ The issue instead was taken up in the *jama'at khana* in Bombay and when the dissenters continued to refuse to pay the dues, they were outcast.¹⁰²

The ousted men, headed by Habib Ibrahim, were known as the Twelve brethren, or *Barbhai*, because they were originally twelve in number. Their grievances reflected the socio-economic changes experienced by a minority of Khojas. A number of *barbhai* Khojas were part of the emerging elite which took advantage of commercial opportunities engendered by the economic transformation taking place in various coastal areas of the Indian sub-continent. From small traders to important shipowners and merchants, the *jama'at* became stratified between a new elite and those whose circumstances, while changed, were not dramatically improved. The elite were, when compared with the majority of their Khoja brethren, relatively educated and much more wealthy. Their identification as Sunnis was motivated not only by a desire to sever ties with the Aga Khan and his constant monetary demands, but also by an effort to improve relations with the dominant Sunni Muslim communities in Bombay. Many feared that the Aga Khan and his authority would undermine their status, influence, and resources. It was also felt that the Aga Khan's leadership was running counter to change and improvement within the community and that if the Khojas were as a whole to advance, then the structure and leadership of the community should foster such developments. If the community was to identify itself with Sunni Islam, then the role of the Imam would be completely negated. By contrast, in the Qasim-Shahi Nizari Isma'ili Shi'a tradition, the Imam was regarded as God on earth.¹⁰³ This sentiment was accepted by many Khojas who were known to "not believe in the existence of any other God but in the shape of the Aga Khan."¹⁰⁴

¹⁰¹For a discussion of how this suit was interpreted by Judge Arnould and absorbed into the later Aga Khan Case, see Fyze, *Cases in the Muhammadan Law*, 530-1.

¹⁰²Fyze, *Cases in the Muhammadan Law*, 530-1.

¹⁰³The Qasim-Shahi Sect, at the time of Imam Hasan II 'ala Dhikrihi al-Salam (d.561/1166), had declared that the Imam could rule with impunity and his word was placed on par with that of the Prophet Muhammad.

¹⁰⁴Ali, *The Origins of the Khojahs*, 53. While this specific quote was taken from a later period, it is apt in its description of the strength of the image of the Aga Khan as the spiritual head of the Khojas.

Such a stance was seen by the *barbhai* as an impediment to the advancement of the community.

Yet the pressures on the *barbhai* to be accepted back into the community were very strong. The *barbhai* and their families were cut off from the rest of the Khoja community. Despite their declared opposition to the Aga Khan and Isma'ili Shi'a Islam and their apparent affiliation with Sunni Islam, their identity as Khojas remained firm. Every aspect of their life, from birth, marriage to death, could not be conducted as before and the weight of excommunication seemed too heavy to bear. The women, especially, appear to have been in favour of reconciliation with the Aga Khan and the majority faction.¹⁰⁵

While the *barbhai* were accepted back into the fold in 1835 after they had paid all their arrears, their stand against the Imam laid the foundations for a dissident party.¹⁰⁶ In various forms, a dissident party of Khojas, growing in numbers throughout the nineteenth century, continued to raise both doctrinal and financial objections to the authority of the Aga Khan.¹⁰⁷

The Great Khoja Case, 1851

While the importance of the 1847 Khoja Female Inheritance cases will be examined in detail in the following chapter, it is important to note how it triggered events which led to further conflicts in the community and the 1851 Great Khoja case. The Aga Khan's position was that he and all his followers were governed by Shi'a law, which outlined inheritance rights for women.¹⁰⁸ Hence the claims of two Khoja daughters, who were suing for a portion of their deceased fathers' estate, were seen as legitimate and deserved his backing. This went

¹⁰⁵These issues will be developed later in the thesis. Of particular note are the petitions by the dissenting party which attempt to prohibit contact between the Aga Khan and women from their faction. This is an interesting irony that clearly demonstrates that the wives, daughters, and mothers of the reformist Khojas did not wholly agree with their menfolk's position, nor were they personally willing to pay the price of excommunication and be barred from their spiritual leader or be cut off from the rest of the community. See K. Goolamlali, *An Appeal to Mr. Ali Solomon Khan*, 41-2 as referred to in Hollister, *The Shi'a of India*, 368.

¹⁰⁶Mahomed Kureem was sent by the Aga Khan I to effect a reconciliation and be the Aga Khan's representative to the Bombay Khoja community. The *barbhai* paid "offerings to the value of six thousand rupees, which they placed at his [Mahomed Kurreem] feet, and did homage for the favor that had been shewn them." Added to the monies already collected by the *jma'at*, a total of Rs 28,000 was remitted to the Aga Khan -- far short of the Rs 100,000 demanded. *BT* (21 July 1851), 1034.

¹⁰⁷Fyze, *Cases in the Muhammadan Law*, 530-1.

¹⁰⁸The Aga Khan was in Calcutta at the time, but sent his brother Muhammad Baqir Khan (d. 1296/1879) to represent his interests.

against the *barbhai* position which held that the daughters' claims went against Khoja customary law. They stated that Khoja custom denied women the right to inherit property, and challenged the Aga Khan's authority over such internal community matters. The British courts, with Sir Erskine Perry as the presiding judge, ruled that Khoja custom was determined by the court to be Hindu Laws of Inheritance, and it should prevail over Islamic law. This decision was not accepted by the Bombay *jama'at khana* which again excommunicated Habib Ibrahim and his supporters in 1848.¹⁰⁹

The renegade Khojas established their own *jama'at khana*, in Mahim, sharing the same building as the existing *jama'at khana*, though on different floors. Such proximity aggravated tensions to the point that on the 13 November 1850, four members of the *barbhais* were killed in a sword fight initiated by supporters of the Aga Khan.¹¹⁰ Nineteen Khojas were brought to trial, with four sentenced to death in a criminal case.¹¹¹ In a move which only inflamed passions further, the Aga Khan presided over the burial of the convicted murders and accorded them with great honour.¹¹²

Tensions rose so high that the conflict within the Khoja community again came before the courts. In 1851 the Great Khoja Case, as it was known, came before Judge Perry. The case began as a conflict over the election of *Mukhi* and *Kamaria* with a motion of trespass submitted by one faction against the other before the court. The *barbhai* supported the 26 April 1848 election of Vully Noor Mahomed and Kakee Hassum as *Mukhi* and *Kamaria*. Dossa Ladduck and Peerbhoy Ibrahim had held the offices the previous year and, with the support of the Aga Khan, refused to acknowledge the election of the other officers and retained their office, refusing to hand over the keys to community properties or caste account books.¹¹³

¹⁰⁹Engineer, *The Muslim Communities of Gujarat*, 39; and Daftary, *The Isma'ilis*, 515. There is no indication that the *jama'at khana* position resulted in the daughters being given the disputed property. Hence, one can argue that despite the *jama'ats* action, the court decision prevailed.

¹¹⁰There had been several smaller squabbles before this, such as accusations of theft of clothing leading to members of the *barbhai* assaulting Aga Khani followers. *BT* (21 July 1851); *The Times of India* (24 April 1866).

¹¹¹They were executed on 18 December 1850. *TC* (10 October 1851).

¹¹²*BT* (21 July 1851); *TC* (10 October 1851).

¹¹³Details on this case can be found in several newspaper reports, primarily: "The Great Khoja Case" *The Bombay Times and Journal of Commerce* (21 July 1851): 1033-1034; "Law Intelligence. The Great Khoja Case" *TC* (12 March 1851): 243-244; "Decision in the Khoja Case" *TC* (10 October 1851), 971; "The Khoja Case" *TC*, 58.

Rather than making a legal ruling, Sir Erskine Perry instead drew up a 'Declaration of Rights' which was intended to resolve the most glaring disputes within the Khoja community. He suggested that all Khojas, regardless of their affiliations with either the Aga Khan or the *barbhai*, had an equal right of access to all community properties. He went on to declare that the Aga Khan had in no way established a right of ownership over Khoja property, nor did he have the right to directly overrule individual *jama'at* decisions regarding such matters as electing their *Mukhi* and *Kamaria*. Furthermore, he stated that all donations to the Aga Khan must be on a voluntary basis. Not long after the dispute, the *barbhais* were re-admitted into the Aga Khan fold.¹¹⁴

The attempt at a compromise did not last long. In early 1861, the Khoja Dost,¹¹⁵ a newspaper established by the *barbhai*, now known as the Khoja Reform Party, urged the reform of religious ceremonies, the establishment of schools for the education of Khoja children, insisted on annual elections for *jama't khana* officials, and attacked the Aga Khan's right of control over community matters.¹¹⁶ Education had long been an interest of the Reform Party as key members established schools, including those which imparted 'Western' learning, and were at the forefront of encouraging Khoja children to become educated.¹¹⁷ In 1865, the Reform Party also founded a Khoja General Reading Room and Library. The Aga Khan not only discouraged these efforts, but forbade his followers attendance at public schools and was strongly against teaching English to Khoja children.¹¹⁸

The greatest point of conflict was over the Aga Khan's authority over Khoja affairs. The dissident faction asserted that the Aga Khan had no right to the authority he assumed over the Khoja community or to enforce any payments from them. These rights were, in their

¹¹⁴Engineer, The Muslim Communities of Gujarat, 39 and Daftary, The Isma'ilis, 515.

¹¹⁵The newspaper was established by the Reform party and edited by Ramdas Bhanji, a Bhatia reformer who was similarly fighting against the authority of his community's spiritual heads. Times of India (22 February 1862), as noted by Dobbin, Urban Leadership, 116.

¹¹⁶As reported in: Bombay Telegraph and Courier (7 May 1861), 861.

¹¹⁷In the mid 1840's, Cassumbhoy Nathubhoy [Kassumbhai Nathubhai] and Muhammad Dama established and financed a school next door to the Bombay *jama'at khana*, which imparted Sunni religious instruction and elementary Western learning free of charge. In the 1850's, reformers established an English school for Khoja children near Masjid Bunder. Children were also encouraged to attend the Goculdas Tejpal Anglo-Vernacular School. Howard, The Shia School of Islam, 91.

¹¹⁸Dobbin, Urban Leadership, 116. It appears that the first Aga Khan had a very traditional Persian education and likely did not have much knowledge or appreciation of 'Western' learning himself.

opinion, abrogated by the fact that the “Aga Khan is a *shea*, and with Sudderdeen, and considers many of the practices of the Khojas as heretical, such as ... the law of succession which excludes females from inheritance when there are no male heirs, &c. &c.” They readily pointed out the financial self-interest inherent in the Aga Khan’s position: “[he does] not hesitate to call himself a Khojah, and the head of the Khojah community, so long as he can derive any income or benefit from their superstitious credulity.” The reform group went on to argue in ringing tones that “the quarrels of the caste are fostered by the Aga Khan with a view to his own aggrandizement.” ¹¹⁹

The Aga Khan responded to the challenge in October 1861 with the preparation of a document which clarified what he deemed to be the proper customs and religious practices of the Khoja community. The document called upon all Khojas to abandon *taqiya*, their “veil of secrecy” and declare themselves openly as Shi’as of the Aga Khani Nizari Isma’ili faith. He proclaimed that Shi’a, not Sunni, practices were to be followed with regards to marriage and funeral rites.¹²⁰ Openly challenging the authority of the colonial courts, the Aga Khan also stated that Shi’a ‘laws’ of inheritance were to be adhered to, not Hindu law.¹²¹ The document was first circulated in the Bombay *jama’at*, then copies were sent to other parts of India and communities outside India. It was signed by the majority of Khojas who agreed henceforth to follow its precepts. Failure to sign amounted to a refusal to accept the authority of the Imam.¹²²

The Reform Party countered with the remarkable claim that the Khojas were, and always had been since their conversion by Pir Sadr al-Din, Sunnis.¹²³ They went on to argue

¹¹⁹TC (12 March 1851).

¹²⁰At the time many Khojas were married by Sunni officials and were buried according to Sunni rites. This only ended in 1864 when the Aga Khan had a Sunni *mulla* evicted from the Mosque, which had been constructed along Sunni lines in 1822 and where he had presided for many years, and prevented any other Sunni officials from performing marriage or funeral rights for Khojas. *Bombay Telegraph and Courier* (21 July 1851).

¹²¹Rattansi, “Islamization and the Khojah Ismaili Community”, 29. With regards to issues of inheritance, as we shall later examine in detail, the Aga Khan’s declaration had no effect.

¹²²With the exception of the Bombay Reform Party members, the book was signed by the majority of the community. In all, there were 1308 Khoja signatories, said to represent their families, though in Bombay there were cases where signatures were taken by boys as young as 10 years of age who clearly did not represent their entire family. All Khojas from outside Bombay appeared to have signed except for those at Moaw, near Bhavnagar, who had close trade relations with the Reform Party. Daftary, *The Isma’ilis*, 515 and Masselos, “The Khojas of Bombay”, 110.

¹²³The first evidence of this position was recorded in the late 1840’s, though it was not a main point of contention between the rival groups. TC (21 July 1851).

that the Aga Khan had no right to manage the affairs or property of the Khoja community. The Reform Party made a stand at the Bombay *jama'at khana* and Khoja burial grounds and attempted to prevent the Aga Khan's faction from entering the area. This led to violent scuffles, and the police were called in to establish order and ensure peaceful access to the areas for both groups.¹²⁴ With this stand, the Reform Party was again cast out in 1862 by a unanimous vote of all non-Reformist Khojas in Bombay. The Reform Party chose to retaliate by going to the Bombay High Court to seek redress. Given the previous cases, in which Sir Erskine Perry ruled that Khoja customs took precedence over Islamic law and the 'Declaration of Rights' outline in 1851, there was some hope for success.

The Aga Khan Case, 1866

The case was tried in 1866 and was known as the Aga Khan Case. The *barbhai* party, under the leadership of Habib Ibrahim's son, Ahmed Habibbhai, demanded that an account be made of all the dues collected from the Khojas, that the property of the community be held in trust for charitable, religious and public uses solely for the benefit of the Khojas and that no Shi'a person could be entitled to any share or interest in the properties. Further, they challenged the Imam's earlier administrative reforms by requiring that the *Mukhis* and *Kamarias* gain their positions through election, not appointment by the Imam. They not only sought to bar the Aga Khan from appointing functionaries to the *jama'ats*, but also from making decisions like excommunicating members from the Khoja community, or even charging any fees for the discharge of his services as a spiritual leader.¹²⁵

The hearings for the case lasted several weeks, with Sir Joseph Arnould presiding. The Aga Khan testified that the Sunni practices which the community followed were tolerated by the doctrine of *taqiya*, and were to be used only during periods of persecution. As the Nizaris had no need to fear persecution under British rule, all Sunni practices must be discarded and the Khoja must be governed by Shi'a law under the authority of their Imam, the Aga Khan. All evidence that could be uncovered regarding this claim and the history of the Khojas was reviewed. The ruling was made in favour of the Aga Khan.¹²⁶ Judge Arnould

¹²⁴Masselos, "The Khojas of Bombay", 110.

¹²⁵Daftary, *The Isma'ilis*, 516.

agreed with the Aga Khan by stating that: "The Khojas have observed these practises... out of Takiah [sic] - concealment of their own religious views and adoption of alien religious ceremonies out of dread of persecution for religion's sake."¹²⁷

The injunction restraining the Aga Khan from interfering in the management of the affairs of the Khoja community, particularly through the appointment of the *Mukhi* and *Kamari* was dismissed. Not only was the Aga Khan declared the undisputed leader, but the British court ruled that Nizari Ismai'lis were required to give customary dues to the Aga Khan and that all community property of the Khojas was to be placed in the name of the Aga Khan and be under his absolute control.¹²⁸ Further, the Khojas were deemed to be Shi'a Isma'ili, not Sunni, Muslims. Sir Joseph Arnould stated unequivocally in his judgement that the Khojas were:

A sect of people whose ancestors were Hindus in origin, which was converted to and has throughout abided in the faith of the Shi'a Imami Isma'ilis and which has always been and still is bound by ties of spiritual allegiance to the hereditary Imams of the Isma'ilis.¹²⁹

After 1866

With this definitive ruling, the most determined of the dissidents refused to rejoin the Aga Khan fold. Some however, decided to accept the authority of the Aga Khan and tried to work within the established structure for change and improvement of the community -- particularly in the area of financial organization and educational advancement.¹³⁰

Those Khojas who found that they could no longer work within the community, seceded. Some declared themselves to be Sunni and became known as Sunni Khojas. One prominent Sunni Khoja was Jairajbhai Pirbhai. He was the leader of the Anjuman-i Islam, a political association interested in issues of reform.¹³¹ Other Sunni Khoja reformers continued

¹²⁶Although the Aga Khan appeared to support the introduction of Shi'a laws of inheritance, his authority and control over community property was enforced while the precedent established by the 1847 Khoja Female Inheritance Case remained unaltered, as will be further explored in Chapter Three and Four.

¹²⁷Fyzee, *The Cases in the Muhammadan Law*, 539.

¹²⁸Prior to this ruling, all community property was held by the *jama'at*, not the Aga Khan. For more details regarding this issue, see Hollister, *The Shi'a of India*, 370.

¹²⁹Fyzee, *The Cases in the Muhammadan Law*, 545.

¹³⁰Engineer, *The Muslim Communities of Gujarat*, 40.

¹³¹Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: Cambridge

the educational thrust begun by the *barbhai* and Khoja Reform Party, supporting schools along British lines. There were also Sunni Khojas who were a part of a movement championing Urdu as the unifying language for all Indian Muslims.¹³²

Some Khojas who had tried to rejoin the Aga Khani Khoja community continued to be dissatisfied, but did not find Sunni Islam to be their answer. Instead, they turned to Ithna ‘Ashari Shi’ism. The majority of these Khojas were converted in the late 1800s by Ayatollah Abdul Qasim Naijfi, a Shi’a religious missionary from Persia. There were approximately fifty members in this offshoot when it was first formed. When they were able to establish their own burial ground and mosque in 1901, they publicly seceded from the Aga Khan. The initial response of the Aga Khani Khoja community was excommunication and there were repeated incidents of physical assault, however, there was eventually a reconciliation.¹³³ The Ithna ‘Ashari Khojas perceive themselves as Khojas, who chose to become Ithna ‘Ashari and by this choice did not in any way compromise their identity as Khojas.¹³⁴ The most prominent Ithna ‘Ashari Khoja was the founder of Pakistan, Mohammad Ali Jinnah.

A last echo of public dissent from the Reform Party was in an open letter signed by an association called the Khojah Reformers’ Society of Karachi in 1927. It was followed by another letter in 1932 which appealed to the Aga Khan III’s son, Prince Ali Khan, to renounce all “claims to divinity” and end the “cult of the dagger” which the author argued threatened all who questioned or showed concern about the authority of the Aga Khan.¹³⁵

The end result of this series of a century of conflicts was that the supreme authority of the Imam was upheld and strengthened¹³⁶ at the expense of a reformist faction in the Khoja

University Press, 1985), 72.

¹³²Prominent among this Sunni Khoja splinter group was A. Pirbhai, the founder of the Anjuman-Islam High School in Bombay. He left an endowment to continue his educational and other efforts, which was disputed in *Cassamally Jairajbhai Peerbhai v. Sir Currimbhoy Ebrahim* (1911) 36 Indian Law Reports, Bombay Series 214.

¹³³For a moving portrait of the life of an Ithna ‘Ashari Khoja family during this period, see Ishvani, *Girl in Bombay* (London: Pilot Press, 1947).

¹³⁴In the 1980s, there were approximately 50,000 Ithna ‘Ashari Khojas in India. Sixty percent of the community settled in Pakistan during partition, with a higher preponderance of the elite of the community, that is to say the industrialists, wealthy businessmen and other professionals, going to Pakistan. Engineer, *The Muslim Communities of Gujarat*, 249-250 and Hollister, *The Shi’a of India*, 372.

¹³⁵The first letter was dated August 1927. The specific letter addressed to Prince Ali Khan was dated November 1932. Details can be found in a description in Hollister, *The Shi’a of India*, 373.

¹³⁶This absolute authority has continued. See Shama S. Ahmed, “Religious Leadership and Social Change in the Ismaili Khoja Community” (M. Soc. Sc. thesis, University of Birmingham, 1975), 13, 46.

community and even his own family.¹³⁷ The *barbhai* may have been motivated in part by commercial self-interest, but at the same time, they also appear to have been genuinely concerned about the organizational structure of the community, and the 'infallible' position of the Imam at the apex.¹³⁸ The dissidents sought to reform their community, much like many other earnest reformers in both the Hindu and Muslim communities of the time. Their ties of kinship and the Khojas' sense of being a distinctive community was keenly felt by the dissidents, as they made several attempts to rejoin the larger Khoja community. Even when a complete break was made from the Aga Khan, as was the case with both Sunni and Ithna 'Ashari Khojas, efforts were made to retain status and ties within the Aga Khani Khoja *jama'at*. The ultimate irony was that by the early twentieth century, the third Aga Khan, Sultan Muhammad Shah (d. 1376/1957), not only embraced many of the reform issues urged by the dissidents, but went even further to actively lead efforts to enhance the position of women, disadvantaged and vulnerable members of the Khoja community.

¹³⁷In 1908, the daughter of Aga Khan III's paternal uncle, Muchul Shah (d. 1321/1903) contended that the Imam should not have sole control of the Khoja offerings, and that the 'gifts' were the property of the whole family. One of her supporters, Murad Mirza, went so far as to claim that Hajji Bibi's son, Samad Shah, should have been the Imam, not Aga Khan III. She took the matter to court, but lost her case. Of note is that despite the Aga Khan I's interest in applying Shi'a laws of inheritance to the Khoja community, he was completely unwilling to have it applied to himself or the property of the Imamate -- a position which continues to be followed to today. See the Haji Bibi Case (1908) as outlined in Daftary, *The Isma'ilis*, 535-6. The original case is found in: *Haji Bibi v. H. H. Sir Sultan Mahomed Shah, The Aga Khan* (1909) 11 *Bombay Law Reporter* 409 or <<http://www.globale.net:80/~heritage/hajibibi.html>>.

¹³⁸The Aga Khan III was only denied the right to excommunicate with the passing of the Prevention of Excommunication Act, 1949 in Bombay.

Chapter Three

Khoja Female Inheritance Cases, 1847

Chapter Three

KHOJA FEMALE INHERITANCE CASES, 1847

Legal Background

Muslims have never been a homogenous group -- a fact made amply clear when examining the history of the Aga Khani Qasim Shahi Nizari Isma'ili Shi'a Muslim sect. Shi'a history is rife with schisms and a variety of sects. Sunnis, though considered the mainstream of Islam, also have a variety of divisions -- most clearly seen with the four law schools and the theological and philosophical differences associated with the different schools. The influence of the Sufis and other offshoots illustrate the richness and range of Islamic beliefs and culture all found under the rubric of one religion.

In India, the numerous Sunni and Shi'a sects also reflect this diversity. Muslims in India come from a wide variety of ethnic backgrounds. Some Muslims migrated to the Indian subcontinent, often absorbing aspects of the culture they encountered in their new home. Others were converted and retained aspects of their pre-conversion culture. Muslims are found at all economic and social strata as well. Such heterogeneity impacted on the way in which these communities practiced Islamic law and how the British understood and interpreted it. This tremendous diversity was, however, generally not reflected in the British constructions of Muslim law in India. At times, a rigid definition of Muslim law was applied. In other instances, as with the Khojas, an anomaly was accepted and applied to future cases with equal rigidity, creating a new norm to be followed with little deviation permitted or allowed. By first outlining briefly the development of 'law' in India from Mughul rule to British Raj, then introducing the development of personal laws in India, one gains insight into the environment within which Judge Perry decided his landmark cases on Khoja and Memon Female Inheritance in 1847.

The cases were truly landmark, as they provided an example of what occurred when women appealed to the colonial courts, an external source of authority, to obtain rights proscribed in the British interpretation of 'Muslim Personal Law'. The cases also recognized the distinctive and syncretic character of the Khoja community, while undermining the community's own method of decision making, in their *jama'at khanas*, and, most

significantly, imposed Hindu laws on a Muslim sect.

Mughal 'Law'

Law, as it was understood by the Mughuls, recognized the heterogeneity of the peoples they ruled.¹ Kozlowski asserts that “[e]ven at the height of their influence and power, the Mughals did not, apparently, consider forcing a single version of *sharia* on India’s disparate Muslim population.”² Not only did the Mughuls never impose a uniform Muslim law upon their Muslim subjects, they also permitted non-Muslims to retain their own decision making bodies and function largely independently of Imperial authority in all personal, family and caste matters. The majority of disputes among Hindus, Muslims and other communities were settled by their own community panchayats first.³ Only a few of these disputes were appealed and went before the *kazi* court.

The *kazis* were responsible for criminal cases and civil cases governed by Muslim law. The *kazis* acted as “military commanders and provincial governors.”⁴ Yet their pay did not reflect such an eminent stature. Much like their later counterparts from the Indian Civil Service in pre-Cornwallis times, *kazis* were poorly paid government functionaries with little status in the Mughul imperial hierarchy. At each level, there was an officer responsible for hearing secular disputes and enforcing state policy. These local representatives could intervene in matters concerning land revenue, imperial grants and even familial disputes over inheritance and succession. At the town level, the officers were called *kotwals*. At the *pargana* level, a district sub-division, *amils* were responsible while *faujdars* held the equivalent function at

¹For a more indepth examination of law as practiced and understood by the Mughuls, see: M. B. Ahmad, The Administration of Justice in Medieval India, (Aligarh: Aligarh Historical Research Institute, 1941); M. Akbar, The Administration of Justice by the Mughals (Lahore: Ashraf, 1948); Irfan Habib, The Agrarian System of Mughal India (Bombay: Asia House, 1963); S. A. Rashid, “*Madaad-i Ma'ash* Grants under the Mughals” Journal of the Pakistan Historical Society 9 (1961), 98-108; and K. M. Yusuf, “The Judiciary in Indian under the Sultans of Delhi and the Mughal Emperor” Indo-Iranica 18, 4 (1965), 1-12.

²Gregory C. Kozlowski, Muslim Endowments and Society in British India (Cambridge: Cambridge University Press, 1985), 105.

³This model may have been espoused by the founders of the Anglo-Indian legal system but did not have the same results. One clear example of the erosion of a community’s ability to resolve its own disputes within a flexible framework which took account of its own customs and contexts was the gradual over-ruling of *panchayat* decisions by the Anglo-Indian Courts. The Khoja Female Inheritance cases are an illustration of this, where the decision of the *jama’at khana* ran contrary to the decision rendered in the court by Judge Perry.

⁴Kozlowski, Muslim Endowments and Society in British India, 104.

the district level. At the provincial level, the *Diwan* or Imperial Treasurer, supervised all aspects of revenue collection and dispute settlement.⁵ The Nawab's court was the last place of appeal.⁶

Even Emperor Muhyi-ad-Din Aurangzeb 'Alamgir I (ruled from 1068/1658 to 1118/1707),⁷ rarely interefered in areas which were later recognized to be in the realm of personal law. Despite his reputation for Islamic orthodoxy and intolerance towards his Hindu subjects, Aurangzeb's 'legal' stance was remarkably accomodating of all the communities under Mughal rule. His main contribution to 'law' in the Indian Sub-continent was ordering the compilation of a 'legal' textbook. The *Fatawa-i 'Alamgiri* or the *Fatawa-i Hind* contained the opinions (*fiqh*) of scholars of the most prominent Muslim legal school in India, the Hanafi school. While the *Fatawa-i Hind* was largely an effort to enhance imperial control rather than establish a strict Muslim legal guide, the book provided some guidance specific to the Indian situation.⁸ One observation that can be made about Aurengzeb's move was that under his rule, the 'traditional' authorities on Islamic law, the *ulema*, were effectively prevented from being the sole purveyors and interpreters of the *shari'a* -- a development which, therefore, began prior to British intervention in Islamic 'legal' matters.⁹

Regarding womens' rights of inheritance under Mughal rule, it is nearly impossible to determine to what extent the *Koran's* stipulated portions to be inherited by Muslim women were applied. However, it is clear that wealth could be inherited through male relations and that there was no ban excluding women from possessing or distributing wealth.¹⁰ Women

⁵M. Rama Jois, Legal and Constitutional History of India. Vol II. Modern Legal, Judicial and Constitutional System (Bombay: N. M. Tripathi, 1990), 18.

⁶M. P. Jain Outlines of Indian Legal History (Bombay: N. M. Tripathi Private Ltd., 1972), 38-41.

⁷Clifford Edmond Bosworth, The Islamic Dynasties. A Chronological and Genealogical Handbook Islamic Surveys 5 (Edinburgh: Edinburgh University Press, 1967), 210.

⁸Kozlowski argues that even Alamgir, considered by many to have been the most "orthodox" Mughul ruler, "shared his predecessors' desire to bind the *ulema* to the imperial authority and to deny them independent status." M. Bakhtawar Khan, *Mir-at 'al-'Alam* I, 49-50 referred to in Kozlowski, Muslim Endowments and Society in British India, 105.

⁹Khosla argues that the Mughul ruler, and not the *Koran* or the *ulema*, was the juducial authority in India. Kholsa goes so far as to state that the submission of the Muslim clergy to the Mughal Emperor was akin to the subordination of the church to the state under Henry VIII of England. R. P. Khosla, "The Mughal Kingship - Legal and Poltical Aspects" Origin & Development of Legal & Political System in India vol I, 184-191, H. S. Bhatia, ed., (New Delhi: Deep & Deep Publications, 1976).

¹⁰As will be explored in the next chapter, under colonial rule significant restrictions were placed on women possessing and distributing wealth. These restrictions were, in most cases, strictly enforced in the

held *zamindaris* or villages, and could sell or dispose of their property without restriction.¹¹ Also wives and daughters of religious scholars “often received a portion of their husband’s or father’s assignment after their male relative’s death” directly from the imperial treasury.¹²

Even more significant is that wealth was not simply *possessing* property but was also measured by the ability to *spend* it. One method of exercising social authority was through building and supporting religious places such as mosques, tombs of saints, and so forth. Festivals held in and around these holy sites were also sponsored. Wealthy Muslim women were prominent in these kinds of charitable acts, suggesting that certain women were able to command considerable control and direction over wealth. Another means of demonstrating economic and social power was through stipends to scholars, saints, writers, or servants. Such female patrons earned respect equal to their male counterparts and public recognition through having their names associated with the institutions or individuals they sponsored.¹³ Even women of modestly wealthy families were credited with maintaining destitute female connections known as *rishtahdars*¹⁴ in imitation of the imperial court.¹⁵ However, it is important to note that these examples of Muslim women exercising control over wealth were not universal and it would be inaccurate to extend these examples to all women under Mughal rule.

With the waning of Mughul control in the eighteenth century, the Mughul system of having local officials mediate disputes and maintain order began to breakdown. The *kazis* sold their *madad-i masah* grants to the highest bidders, though sometimes their positions went unfilled for years. Bribery was a common way to ensure a favourable decision and little pretence was made of following either Mughul imperial regulation or the *shari’a*.¹⁶ Within a colonial courts.

¹¹ Rekha Misra, Women in Mughal India (1526-1748 A.D.) (Delhi: Munshiram Manoharlal, 1967), 135-7.

¹² Gregory C. Kozlowski, “Muslim women and control of property in North India” In Women in Colonial India, J. Krishnamurty, ed., (Delhi: Oxford University Press, 1989), 121.

¹³ Kozlowski, “Muslim women and control of property in North India”, 120-1 and Rekha Misra, Women in Mughal India (1526-1748 A.D.) (Delhi: Munshiram Manoharlal, 1967), 59-76.

¹⁴ Most of these women were widows and spinsters, and, though accepted within the households as ‘relations’, the literal translation of *rishtahdar*, were not necessarily direct or close relatives.

¹⁵ Kozlowski notes that these tended to be less wealthy but ‘socially ambitious families’. Kozlowski, “Muslim women and control of property in North India”, 120-1.

few years of British encroachment on Mughul authority, “Indians were complaining that *qazis* were corrupt and oppressive” and began appealing to the East India Company for justice.¹⁷

Colonial ‘Law’

The judicial history of the East India Company (EIC) in India can be found in many sources.¹⁸ What is important to note are the trends in the formation and evolution of Anglo-Indian law. When the EIC was appointed Chief Treasurer (*Diwan*) of Bengal in 1765, it became responsible for collecting revenue, administering Mughal justice and supervising the *kazis*. Warren Hastings was appointed as governor of Fort William in 1772, and decided that British officials should be directly engaged in both the functions of dispute settlement and revenue collection. Hastings decreed that the ‘laws’ of Hindus and Muslims would be applied in all matters pertaining to “inheritance, marriage, caste and other religious institutions.”¹⁹ His declaration became law with the Act of 1781 which required the application of Hindu or Muslim law for relevant cases before the Supreme Court of Calcutta.²⁰

The problem then turned to determining what were Hindu and Muslim laws and how the EIC officials were to apply them. Under the EIC, its employees had lectures on British law as a part of their education first at Haileybury College and then at Fort William College in Calcutta, however, “[n]ot even the staunchest defenders of Company rule contended that this

¹⁶Jain states that the *kazis* received no salary, instead exacted a fee from both parties involved in litigation, imposed fines for petty offences and commanded one-fourth of the debts or property recovered through the court. Using a document written in 1773 regarding English Government in Bengal, Jain argues that the decisions rendered were little more than “corrupt bargains with the highest bidder.” Jain, Outlines of Indian Legal History, 39. See also: B. Cohn, “From Indian Status to British Contract” Journal of Economic History 16, 4 (1961), 615.

¹⁷B. N. Pandey, The Introduction of English Law into India (New York: Asia Publishing House, 1967), 136-141.

¹⁸H. S. Bhatia, ed., Origin & Development of Legal & Political System in India 2 vols., (New Delhi: Deep & Deep Publications, 1976); Herbert Cowell, History and Constitution of the Courts and Legislative Authorities in India (Calcutta: Thacker, Spink & Co., 1936); M. P. Jain, Outlines of Indian Legal History (Bombay: N. M. Tripathi, 1972); M. Rama Jois, Legal and Constitutional History of India Vol II (Bombay, N. M. Tripathi, 1990); George Claus Rankin, Background in Indian Law (Cambridge: Cambridge University Press, 1946); Chittaranjan Sinha, The Indian Civil Judiciary in Making. 1800-33 (New Delhi: Munshiram Manoharlal, 1971); R. C. Srivastava, Development of Judicial System in India Under the East India Company. 1833-1858 (Lucknow: Lucknow Publishing House, 1971).

¹⁹Rankin, Background in Indian Law, 2.

²⁰Jain, Outlines of Indian Legal History, 585.

training produced legal scholars.”²¹ Very little attention was paid to indigenous ‘legal systems.’ To compensate for this ignorance, the Company courts employed Muslims and Hindus, who were presumed to be ‘legal experts’ for their respective communities. Significantly, it has not been possible to determine whether any of these early ‘legal experts’ were considered experts by their peers, nor whether they came from traditional backgrounds and training as *ulema* or *pandits*.²²

Reliance on native experts was increasingly questioned by many judges and observers of the emerging legal system. Due to ignorance of indigenous legal practices, the British EIC officials became prejudiced, as they were increasingly frustrated with their native experts and yearned for ‘reliable’ written ‘laws’ which they could then apply in a familiar judicial manner. The highly inflammatory and derogatory language used by these officials to complain about the native experts is well established.²³ The answer was to circumvent such a reliance and create a new system.

Hastings, as Governor General of India, encouraged orientalist study. With this, a process of reconstructing India’s past and privileging certain texts as ‘authorities’ over others commenced.²⁴ These texts were then translated into English and also into terminology understandable to British judges and lawyers. Although some of the earlier EIC officials, by necessity, became adept at Indian languages, few judges or litigators were fluent in either Sanskrit or Arabic, the languages of Hindu and Muslim religious textual traditions.²⁵ It was at this point that British officers, orientalist scholars, and others became engaged in a game of translating not only sources of law, but also entire traditions and frameworks, so that decisions could be rendered in first the Company, then the colonial courts.

²¹ Kozlowski, Muslim Endowments and Society in British India, 112.

²² In the first half of the nineteenth century, Sanskrit colleges in Benares and Calcutta were set up to train Brahmin pandits. Janaki Nair, Women and Law in Colonial India (Delhi: Kali for Women, 1996), 25.

²³ Sir William Jones, a distinguished Supreme Court Judge, was quite public in his argument that native lawyers and scholars were unreliable. “[W]e can never be sure that we have been deceived by them.” He had grave misgivings about the honesty and integrity of *pandits* who were called upon as experts, and thought that even if there was no suspicion of corruption, the ‘science’ of law “which they profess is in such a state of confusion that no reliance can be placed on their answers.” Jain, Outlines of Indian Legal History, 583-4.

²⁴ Nair, Women and Law in Colonial India, 20-1.

²⁵ Jain noted that very few Europeans learnt Sanskrit or Arabic as they believed that neither language led “to any advantage in worldly pursuits.” Jain, Outlines of Indian Legal History, 583.

Hindu Law

When the British decided to abandon their use of chosen *pandits* and *ulema* as living witnesses to attest to the particulars of Hindu or Muslim law, what were the sources used to determine the personal laws of Hindus and Muslims? Prior to Sir Henry Maine, reputed to be among India's great 'law lords', very little in the way of source material was translated and available to the average member of the colonial legal system.²⁶ Hence, Maine's celebrated legal status is derived from not only his importance in legal reform, but also for his 'discovery' of Indian legal material.²⁷

The creation of Hindu law was very much a product of the experts who were brought in to help in its determination. The laws set out originally reflected the regional interpretation and status chauvinism of the informers, as well as the reliance upon texts which also supported brahminical and orthodox interpretation.²⁸ The regional bias was quite clearly in favour of Bengal and northern India. It was not until the late nineteenth century, well past this earlier formulatory phase, that any texts from southern India were incorporated.²⁹

Particularly with the formation of Hindu law, choices were made regarding what would be taken as the correct authority on a given issue. J. Duncan M. Derret quips that the British were the "patrons of sastra," suggesting that the desire for ancient law texts led to the production of new ones.³⁰ The *shastras* were actually a blanket term used to refer to sacred Vedic texts, the *dharmashastras*, various *srutis*, *smritis*, and a range of additional digests

²⁶Nearly all of the 'black book' colonial legal histories credit Maine as the primary person responsible for the clear formulation of personal laws. Jain, Outlines of Indian Legal History, 583. Sir Elijah Impey, Supreme Court Judge and Chief Justice of the *Sadr Diwai Adalat* from 1781, was also a key figure in the development and application of the colonial legal system. Sinha, The Indian Civil Judiciary in Making, 117-8 and Jain, Outlines of Indian Legal History, 466-7. Sir William Jones, a Supreme Court judge and scholar, was also considered an exceptional expert on Hindu and Muslim law. Jain, Outlines of Indian Legal History, 583.

²⁷J. Duncan M. Derret, "Sir Henry Maine and Law in India. 1858-1958" Juridical Review (April 1959), 40-55; reprinted in J. Duncan M. Derret, Essays in Classical and Modern Hindu Law. Volume Two Consequences of the Intellectual Exchange with the Foreign Powers (Leiden: E. J. Brill, 1977), 260-275.

²⁸For the issue of *sati*, these biases are ably explored in: Lata Mani, "Contentious Traditions: The Debate on *Sati* in Colonial India" in Recasting Women, 88-126, Kumkum Sangari and Sudesh Vaid, ed., (New Brunswick, NJ: Rutgers University Press, 1989).

²⁹A text from southern India, the *Malayala Vyavahara Mala* was published in the late nineteenth century. Nair, Women and Law in Colonial India, 25. I have, as well, yet to find in my research any evidence of texts from southern India being utilized in the colonial courts prior to this period.

³⁰See Derret, "The Juridical Fabrication of Early British India: The Mahanirvana-Tantra" Essays in Classical and Modern Hindu Law II, 197-242.

and commentaries.³¹ *Dharmashastras* literally means rules of right conduct and are generally understood to be the 'laws' of Hinduism.³² However, as many later scholars take pains to note, the *shastras* were a set of precepts rather than what could be construed as legally binding statutes. The *vyavasthas*,³³ or commentaries by a variety of pandits on customary practices, readings of the *shastras* and diverse materials from epics and legends, treatises from the *puranas*, other *smritis*, *agamas*, and *tantras* became the basis of judgements made on matters pertaining to Hindu law in the courts.³⁴

Many of these sources were conflicting, and so certain texts were given greater importance than others. More 'orthodox' texts and interpretations which favoured the supremacy of Brahmin customs, particularly Bengali and northern Indian traditions, were privileged over the more diverse range of customs and practices found throughout India. Hence, the *Dayabhaga* and the *Mitakshara* were given predominance over the other *shastras* for the majority of Hindus. Gradually, as the colonial system developed in the nineteenth century, more and more *shastras* were accepted, and the various traditions became 'schools' of Hindu law, yet British Indian jurisprudence still retained the bias of the earliest informers and orientalist scholars.³⁵

The accepted foundation of all Hindu law was the 'Laws of Manu.'³⁶ The paternalistic position on women enunciated by Manu has been blamed for being responsible for much of

³¹Several Hindu texts were used as sources in the Sanskrit schools for the native experts: *Mataksara, Dayabhaga, Daya Krama, Daya Tattva, the Dattaka Cadrika, the Dattaka Mimamsa, Vivada Chintamani, Tithi Tattva, Suddhi Tattva, and Prayascitta Tattva*. Nair, *Women and Law in Colonial India*, 25.

³²Susan Wadley, "Women and the Hindu Tradition" in *Women in Indian Society*, Rehana Ghadially ed., (New Delhi: Sage Publications, 1988), 29.

³³In the colonial context, the *vyavasthas*, were the written responses of the *pandits* to specific questions or legal issues posed by the colonial officials based on their exegesis of scriptural texts. Mani, "Contentious Traditions", 95. *Vyavasthas* have been interpreted to be a not simply 'civil justice' but encompass 'judicial matters' both civil and criminal. Rankin, *Background to Indian Law*, 186-7.

³⁴Nair, *Women and Law in Colonial India*, 26.

³⁵The *Dayabhaga* was considered the Bengal school. The *Mitakshara* was followed by most of the courts outside of Bengal, but had further sub-divisions, or sub-schools by region: Benares, Bombay, Madras or Dravida, and Mithila. Jain, *Outlines of Indian Legal History*, 596-7 and Indu Prakash Singh, *Women, Law and Social Change in India*, (Delhi: Radiant Publishers, 1989), 2, 162, ff 10.

³⁶Ramabai wrote in *The High Caste Hindu Woman* a spirited critique of Manu and Sanskrit literature. Leslie A. Flemming, "Between Two Worlds: Self-Construction and Self-Identity in the Writings of Three Nineteenth-Century Indian Christian Women", in *Women as Subjects*, Nita Kumar, ed., (New Delhi: Stree, 1994), 97-8.

the patriarchy, disabilities and “perpetual tutelage” imposed on women in India.³⁷ The phrase most often quoted from Manu is:

Her father protects [her] in childhood, her husband protects [her] in youth, and her sons protect her in old age; a woman is never fit for independence.³⁸

The Laws of Manu clearly stipulated that in many ways a woman had no need of independence, as she was to be cared for by her male relations, with her existence meant to serve them well.³⁹ One may therefore conclude that women had no need of, nor right to, inherit property.

Muslim Law

Unlike the Hindu tradition, Muslims had four explicit law schools and a range of texts which the Anglo-Indian law system could rely upon and re-interpret to create a number of direct equivalences. British officials perceived in Islam a system of law which mirrored their own. Therefore, the *shari'a* was, for all intents and purposes, Muslim law to be directly equated with a set of legal prescriptions which could be used by British judges to rule on a complete range of personal issues. The ‘sources’ of Muslim law were identified as the Muslim Holy book (*Koran*), the example of the Prophet (*sunna*), and the *shari'a*.⁴⁰ Eighth and ninth century scholars of the *shari'a* became the appropriate ‘legal authorities’ to consult.⁴¹ The opinions (*fatwas*) of these ‘legal authorities’ were treated as legal ‘precedents’, with their treatises being ‘legal textbooks’. The ‘judges’ in this parallel legal system were the *kazis*, “official guardians of the *sharia* appointed by Muslim rulers,” with the ‘lawyers’ being the *ulema*.⁴²

³⁷Singh, Women, Law and Social Change in India, 2.

³⁸Laws of Manu, ch, IX, v. 3, 328 (Buhler translation, 1964 reprint) as quoted in B. Sivaramayya, Women's Rights of Inheritance in India (Madras: The Madras Law Journal Office, 1973), 3.

³⁹It is interesting to note that scholars like Ashish Nandy and Susan Wadley refer to women as possessing *shakti* or power. Their perceived power was thus why men, and the laws of Manu, struggled to subordinate and subdue them. As noted in Ann Brodzins Gold, “Gender, Violence and Power: Rajasthani Stories of Shakti” Women as Subjects, 31 - 31. See Ashish Nandy, “Woman versus Womanliness in India: An Essay in Social and Political Psychology” in Women in India Society, Rehana Ghadially, ed., (New Delhi: Sage Publications, 1988), 69-80 and Wadley, “Women and the Hindu Tradition”, 23-43.

⁴⁰Kozlowski, Muslim Endowments and Society in British India, 97.

⁴¹Kozlowski ironically quips that these became the Muslim counterparts of Coke and Blackstone.

⁴²Kozlowski, Muslim Endowments and Society in British India, 97.

Thus, the entire world and experience of Islam was reduced to concepts which were readily understood and directly translated within the prism of British law, legal system and mind-set. As a result, British judges did not seek to understand the *shari'a* on its own terms or within its own context, but as a tool to be applied within the praxis of British law to make decisions regarding communities of an altogether different religious, cultural and historical background. The 'Law Lords' made judgements binding on all Muslims in India and elsewhere in the Empire, without troubling to comprehend significant differences within the various Muslim communities or realizing that they possessed at best a limited understanding of Muslim 'law.'

The problem was that Muslims in India were not a homogenous community who were orthodox in their religious observances and adhered to conservative and unchanging rules as laid down by their Prophet. The direct equivalences accepted by most practitioners in the colonial courts sought to enforce a unity within Islam that did not actually exist. It has been argued that these assumptions were partially based on similar notions held by Muslims themselves about their relationship with the *Koran*, *sunna*, and *shari'a*, with the ideal of Islam being both monolithic and having all Muslims equal under their submission to Allah.

There is a tension between theory and practice in the development of the *shari'a*. Interpretations of the *Koran* have varied widely in the course of the centuries since the time of the Prophet. While most Muslims would agree that the *shari'a* is important, different interpretations coexisted. History is replete with numerous examples of situations in which these regulations were "ignored or reinterpreted to allow for non-conformist behaviour."⁴³ Many sects do not even turn to the *shari'a* as the main authority or guide to leading the life of a good Muslim. This diversity of opinions has even been rationalized by quoting the Prophet: "After my death there will be seventy-two sects among the Muslims, but I will be in the seventy-third."⁴⁴

The colonial courts were slow in recognizing such plurality and struggled to find ways to respond when confronted with the reality of the various Muslim communities in India. The only translations of *shari'a* used by the courts were based on the Sunni Hanafi legal school.⁴⁵ The courts did not even recognize the distinction between Sunni and Shi'a Islam

⁴³Kozlowski, *Muslim Endowments and Society in British India*, 99.

⁴⁴Kozlowski, *Muslim Endowments and Society in British India*, 99.

until 1842.⁴⁶ For Shi'a Muslims especially, the application of the *shari'a* was much looser and more closely linked with changing circumstances than was understood by British interpretations of Muslim law. As the main source of guidance and leadership came from the Imams of the day, Shi'as could stray further from the more strict interpretations of the *shari'a*. Shi'as frequently had traditions at variance with the *shari'a*, particularly in the Bombay Presidency, the Punjab, and parts of South India as well.

Custom and Colonial Law

However, it was not only Muslims who faced such a dichotomy between their previous practices and a new legal system, but also Hindus and various other communities. Largely in response to such dilemmas, Bombay Regulation IV was adopted in 1827 which permitted the acceptance of 'custom' for personal laws in India. The regulation, subsection 26, stated that:

The Law to be observed in the trial of suits shall be Act of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone.⁴⁷

Under this Regulation, customs which differed from the provisions of Muslim law were given sanction in Bombay, particularly in the case of those communities which were perceived as 'quasi-Muslims.'⁴⁸ The 1847 Khoja Female Inheritance cases were a prime example of a

⁴⁵The four Sunni schools (*mazahab*) stem from the expositions of the *shari'a* offered by one of four *Imams*: Abu Hanifa (d. A. D. 767), Malik ibn Anas (d. A. D. 795), ash-Shafi (d. A.D. 820) and Ahmad ibn Hanbal (d. A.D. 855). These schools are even further sub-divided and other schools exist outside of these main ones. Kozlowski, *Muslim Endowments and Society in British India*, 100. J. N. D. Anderson, "The Nature of Sources of Islamic Law" in *Contributions to the Study of Indian Law and Society* (Philadelphia: University of Philadelphia South Asia Seminar, 1966-1967); N. J. Coulson, *A History of Islamic Law* Islamic Surveys 2 (Edinburgh: Edinburgh University Press, 1964) and Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964) provide standard introductions to the four schools.

⁴⁶Kozlowski's 1842 date refers to formal recognition in all colonial courts. Kozlowski, *Muslim Endowments and Society in British India*, 118. In 1810 the Privy Council ruled in the *Rajah Deedar Hossain* case that Shi'a law was to be applied to Shi'a Muslims in Bengal. Jain, *Outlines of Indian Legal History*, 596.

⁴⁷Provided in Hamid Ali, "The Customary and Statutory Laws of Muslims in India" *Islamic Culture* 11 (1937), 354.

⁴⁸Hamid Ali provides an excellent overview of the colonial treatment of 'quasi-Muslims.' See Hamid Ali, "The Customary and Statutory Laws of Muslims in India".

community that did not neatly fit into the legal 'box' set out in the British formulation of Muslim law. The judgement made by Perry was later credited with being the key ruling responsible for the acceptance of 'custom' as a means to mitigate or ignore the rigid rules found in Muslim and Hindu personal laws in the Bombay Presidency.⁴⁹

Khoja Female Inheritance Cases

In 1847 two separate but related legal cases were initiated over inheritance of a joint estate by two Khoja cousins.⁵⁰ The cousins, Hirbai and Gangbai, sued the widow of Gangbai's father, Sajun Mir Ali. The two cases were *Hirbai v. Sonabi* and *Gangbai v. Sonabi*. They were also sometimes referred to as the Sajun Mir Ali cases, the estate in question, which also included the estate of Sajun's brother, Haji Mir Ali. Soon after the cases were heard, they were known as the 'celebrated Khoja Female Inheritance Case.'⁵¹ In his decision, Judge Perry linked the Khoja cases with that of a similar case regarding women, inheritance and custom in the Memon community. Perry later published a book containing several of his judgements. As this was prior to any official law reports or regular publications reporting the cases heard by the colonial courts, Perry's book, Cases Illustrative of Oriental Life. The Application of English Law to India, became a key source of legal precedents for the Bombay Presidency.⁵² Later references to Perry's judgement were abbreviated simply to the Khojas' and Memons' case.

First to be addressed are the specifics of the Khoja Female Inheritance cases. Who were

⁴⁹Jain, Outlines of Indian Legal History, 597-8.

⁵⁰An interesting comparison is found in a later case regarding the use of 'custom' to prevent a Shi'a woman from inheriting her share of her father's estates. See *Abdul Hussein v. Bibi Sona Dero* (1917) 45 Cases in the Privy Council on Appeal from the East Indies, 10 in Asaf A. A. Fyzee, Cases in Muhammadan Law of India and Pakistan 2nd ed., (1949; Oxford: Oxford University Press, 1955), 94-102.

⁵¹In the newspaper report of the case in 1847, it was listed as "Gangbae, wife of Noor Mahomed Dathooboy vs. Sonebaee and Rahimutbaee, Executrixes of Sajun Meer Ally, deceased." When Sir Erskine Perry later wrote his judgement he combined Gangbai's case with that of her cousin, Hirbai, and refers to the cases as "Case of the Khojahs. *Hirbae and others v. Sonabae. Gungbae v. Sonabae.*" Fyzee, Cases in Muhammadan Law of India and Pakistan, xxix. Among other sources, Howard, in the 1866 Aga Khan Case, referred to *Hirbai v. Sonebai* as the "celebrated Khoja female case." E. I. Howard, The Shia School of Islam and Its Branches especially that of the Imahee-Ismaelies. A Speech Delivered by E. I. Howard, Esquire, Barrister-at-Law, In the Bombay High Court, in June, 1866 (Bombay: "Oriental Press", 1866), 71. Both 'Khoja Female Inheritance Case' and 'Khoja and Memon Case' have been retained as the common reference to these cases in both later court cases and secondary literature.

⁵²Erskine Perry, Cases Illustrative of Oriental Life. The Application of English Law to India, (1853; New Delhi: Asian Educational Services, 1988).

the main participants and what were the central issues in the case? What was the evidence provided by the witnesses with regards to inheritance rights for women and how were disputes regarding inheritance handled by the Khoja community outside of the courts? How did Judge Perry approach these issues, what legal resources and precedents did he refer to, and to what effect? How did Judge Perry grapple with the entire problem of custom and justify applying Hindu laws of inheritance to a Muslim community? The further implications and impact of the cases will be explored in the next chapter.

The Participants

In essence, the 1847 Khoja Female Inheritance cases were a family dispute over property which went on for several years. Later observers blamed the original case and disputants for all subsequent Khoja litigation! While clearly an exaggeration, some parties continued to appeal to the courts after this case to try and obtain a judgement in their favour. By examining the information provided in related cases and newspaper reports, a sense of who the family participants were and a little of their lives and motivations can be discerned. The Aga Khan's participation in the case will be explored in a later section along with the *barbhai* position.

Haji Mir Ali⁵³ was a Bombay based merchant whose property, consisting of both land and movables, was estimated at being worth three lakh of rupees.⁵⁴ Haji and his brother, Sajun Mir Ali,⁵⁵ were business partners and lived together jointly in one household with all their dependants. When Haji died in 1842, he did not leave a written will, hence died intestate. However, as he lived jointly with his brother, it was presumed that all of the estate would belong to Sajun. A verbal will was apparently made which left Haji's property to both his wife and brother. There was no mention of any kind of promises or understanding which would provide any kind of inheritance for his daughters.⁵⁶

Haji had four wives, however only one, Sonebai, survived him.⁵⁷ Sonebai continued

⁵³Consistent transliteration was not in force at the time of the case. Hence, Haji Mir Ali was also Hajee Meer Ally, Hadjibhae and simply Hajee.

⁵⁴Perry, Oriental Cases, 111.

⁵⁵Also Sagan Mir Ali, Sajun Meer Ally, Sajan Mir Alli, Sajan and Sajee.

⁵⁶Testimony of Mahomed Dathoobhoy in Telegraph and Courier (24 June 1847), 599.

⁵⁷Also Sonebae and Sonabi.

to live in his home with his brother, brother's wife and daughters. Haji had no sons, only daughters. There is some ambiguity as to whether he had two or three daughters. In a newspaper report, after noting that Haji had two daughters by different wives, it then went on to state that he "left another daughter called Sabbae."⁵⁸ By contrast, Judge Perry stated that Haji Mir Ali was survived by only two daughters, not three, and identified one as Hirbai⁵⁹ and an unnamed infant daughter.⁶⁰ Hirbai was Haji's eldest daughter and brought forward the plea in the case. There is no indication which, if any, of Haji's daughters were by his surviving widow Sonebai.⁶¹

It is not inconceivable that the plaintiff, Hirbai, was Haji's widow's step-daughter. She was an adult at the time of the case and appeared to have little hesitation taking her father's widow to court. One presumes that if this was a direct conflict between mother and daughter this point would have been mentioned by the judge, one of the lawyers, or in the newspaper reports.⁶² Hirbai, however, was clearly identified only as Haji Mir Ali's daughter, a distinction which suggests, though does not prove, that Sonebai was her step-mother.

Also significant to the case was the fact that the plaintiff Hirbai was married. Her husband, Jeer Mahomed Ebram, was described as a "very poor man" who kept a rice shop.⁶³ This provides a strong economic motivation for her bringing about the case as her father was, by the standards of the day, quite a wealthy man at the time of his death. It is not too difficult to imagine a situation in which a young girl was married to a modest but respectable young man at a time when her father's business venture was equally modest. To then watch her father's wealth grow and remaining family prosper while she struggled would be difficult enough. To then have the entire estate inherited by her step-mother and receive

⁵⁸Telegraph and Courier (24 June 1847), 599.

⁵⁹Also Huraboye, Heeboy, and Hasaboye.

⁶⁰Perry stated: "The plaintiff Hirbae, and her infant sister, were the only children of Hadjibhae Mir Ali, late a merchant in Bombay, who died intestate, leaving behind him a widow, Sonabae." Perry, Oriental Cases, 111.

⁶¹Telegraph and Courier (24 June 1847), 599.

⁶²In a review of many cases concerning family conflicts over a woman's right to inheritance in the Bombay Law Reporter when it was a daughter taking her mother to court, this relationship was frequently stated. However, there are other cases where, like in this one, only 'widow' and 'daughter' are identified. However, in a joint family system it is also debatable what affect or influence the biological relationship has over the reality in which mother's life expectancy was often highly precarious and children were raised by an assortment of aunts, second wives, and so forth.

⁶³Testimony of Mahomed Dathooboy in Telegraph and Courier (24 June 1847), 599.

nothing, save some small tokens of respect in the form of jewelry, would provide ample provocation to try and seek out an alternative. To a resourceful woman, or an envious husband, taking one's father's widow to court seems an eminently reasonable course -- particularly if Muslim personal law provides daughters the right to inherit a portion of their father's estate, and even more so if the spiritual head of the community is willing to lend his support to one's cause.⁶⁴

Sajun Mir Ali, Haji Mir Ali's brother, died a year after his brother in 1843. Unlike Haji, Sajun wrote a will which made his widow and brother's widow, Sonebai, co-executrices of the estate. Sajun Mir Ali clearly recognized Sonebai's status as the widow of his deceased brother, and since the estate was undivided, gave both widows equal and joint responsibility for its management. For some time, the widows were primary shareholders in the family business firm Sajan Meer Ali and Co.⁶⁵

Sajun was survived by only one wife, Rahimutbai, and two daughters.⁶⁶ His daughter Gangbai⁶⁷ was the plaintiff in a second case which was combined in Judge Perry's decision with that of her cousin Hirbai's case against Sonebai. She was also married at the time of the case to a Khoja named Noor Mahomed Dathoboy.⁶⁸ Unlike her cousin Hirbai's husband, Noor Mahomed took an active role in the case and provided testimony regarding the family and business affairs. While he identified himself as Haji Mir Ali's son-in-law, Gangbai is clearly referred to as Sajun Mir Ali's daughter in several sources.⁶⁹ Nothing was

⁶⁴This is pure speculation, but a plausible insight into the actors motivations and circumstances.

⁶⁵Testimony of Mahomed Danae in Telegraph and Courier (24 June 1847), 599.

⁶⁶Telegraph and Courier (24 June 1847), 599.

⁶⁷Also Gangbae, Gangoye, Gungbae, Gangbai, and with diacritical marks, Gángbái.

⁶⁸Also Mahomed Dadabhoy and Nu'r Muhammad Dattu-Bháí.

⁶⁹Noor Mahomed Dadabhai testified that he was Haji Mir Ali's son-in-law and that "When my father died, he left his property by will to his brother and widow." [Evidence of Noor Mahomed Dadabhoy in Telegraph and Courier (24 June 1847), 599] There is an ambiguity in this testimony as to whether he was referring to his own father or Gangbai's. Most witnesses recalled their own family inheritance practices then cited that of others. Noor Mahomed Dadabhai had just been discussing his father-in-law before making the above statement. There is also some sense that he was engaged in trade with his father-in-law, perhaps as a nominal business partner. With the death of both brothers, this relationship may have been changed or become undermined with the assumption of control by the widows. Hence, there may have also been a struggle for power and control over the family's business affairs. On the issue of whether Haji or Saji was Noor Mahomed Dadabhai's father-in-law, Judge Perry clearly identifies Gangbai as the cousin of Hirbai, that is, the daughter of Sajun Mir Ali. Hence her husband, Noor Mahomed Dadabhai would have to be Sajun Mir Ali's, not Haji Mir Ali's son-in-law. [Perry, Oriental Cases, 114] However, since the brother's lived jointly, it is not inconceivable that either could be referred to as one's *sasur* (in-law). It is also entirely possible that

said in regards to the second daughter and no mention was made of any provisions for either daughter in their father's will.

Gangbai seems to have been a woman of strength and character. Some years after the 1847 case, she held the reputation of being a "very intelligent lady" in the Khoja community.⁷⁰ She was known as the "head of the house", referring to her home with her son, Fazul Noor Mahomed, and several daughters-in-law.⁷¹ More significantly, her objections to the disposition of her father's estate did not end with the Khoja Female Inheritance Case. Sixteen years later she took the executor of her father's widow, Thavar Mulla, to court. In this suit she objected to the quarter of the estate bequeathed by Rahimatbai to charity. Gangbai asserted that this quarter rightly belonged to her, as the "sole next of kin and heir at law of Sajan Mir Alli."⁷² Interestingly, there is no indication that she objected to the will giving half of the estate to Rahimatbai's own heirs which included two adopted daughters.⁷³

Rahimutbai, Sajun's widow, also appears to have been an interesting woman. She was credited with founding a school and using the estate which she inherited from her husband towards a variety of charitable purposes.⁷⁴ In her will, she suggested certain charities which

Noor Mahomed Dadabhai's statement regarding his father-in-law was reported incorrectly. Perry, Oriental Cases, 111; Telegraph and Courier (24 June 1847), 599; and *Hirbai v. Gorebai* (1875) 12 Bombay High Court Reports 294.

⁷⁰Evidence regarding the *Hirbai v. Gorebai* case can be found in the Maharashtra State Archives SRO, Judicial Department 1880, vol. 31. The archive report includes the judgement, *Hirbai v. Gorebai*, Sir Charles Sargent's notes of the hearing (including all testimony), the Order of Court, and Hirbai's Memorandum of Appeal against it. The section including the hearing is from pp. 45-151 of the total volume, but is referred to in this thesis by the hearing page numbers 1-98. Hence the reference style will be SRO, JD 1880, 31, *H v. G* Hearing, [number]. Testimony of Rahimbhoy Hemraj in SRO, JD 1880, 31, *H v. G* Hearing, 14.

⁷¹Testimony of Rahimbhoy Hemraj in SRO, JD 1880, 31, *H v. G* Hearing, 14. It is probable that this was a joint family with several sons and not that Fazul Noor Mahomed had several wives, as the Khoja Community did not generally condone second marriages while the first wife lived. One had to have approval of both the first wife and the *jama'at khana* before being permitted to marry again, and normally this was given only when there were no children by the first wife or they were separated.

⁷²*Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports, 72. This case is discussed in detail in Chapter Four, 105-110.

⁷³Testimony of Sivjibhoy Manekbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 3.

⁷⁴Testimony of Dhurumsey Khakoo in SRO, JD 1880, 31, *H v. G* Hearing, 10. A school was also mentioned in the context of the quarter of Rahimatbai's estate which she left in the care of Thavar Mulla for charitable purposes. Mulla indicated that he would use this portion towards a school or hospital, consistent with the term "charity" under English Law. *Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports, 73.

she felt worthy of support. These included:

building a public room and veranda and tank for the use of the caste; the purchase of land near Mundiá, in Cutch, the produce of which was to be distributed to the indigent poor of Mundiá; the purchase of rice and cloth to be distributed to beggars and poor at the certain places; the maintenance of a well for cattle to drink at; the supply of drinking water *gratis* to the public at the gate of the Custom House in Bombay in the hot weather.⁷⁵

As noted earlier, during the Mughal period, charitable bequeaths were one method of women posthumously earning respect and a position of importance within their communities. It is also interesting to note the choices made by Rahimatbai, particularly her provision of a drinking well for cattle. Cows are revered amongst Hindus and were later used as a point of contention between Hindus and Muslims -- with rumours of Muslims slaughtering cows inflaming communal tensions.

More remarkable, Rahimatbai adopted two girls and recognized them in her will.⁷⁶ It is significant that she chose to adopt daughters, and that she was confident that they would be recognized as her heirs despite her having denied her husband's daughters a portion of his estate. Here again, as with Hirbai and Sonebai, there is no evidence to substantiate whether Gangbai was Rahimatbai's daughter or step-daughter, or even whether the exact nature of their relationship would have made a difference. However, it is illuminating to note her clear distinction in her will between her husband's heirs, like Gangbai, and her own heirs, her adopted daughters.⁷⁷

The Issues

The daughters, Hirbai and Gangbai, explicitly brought forward three issues in their plea: whether the Khojas were subject to Muslim laws of succession or not; whether upon the intestate death of Haji Mir Ali, his brother, Sajun Mir Ali succeeded to his estate to the exclusion of his daughters, subject only to their marriage and maintenance; and, whether upon

⁷⁵*Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports, 72.

⁷⁶Testimony of Sivjibhoy Manekhbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 3.

⁷⁷Her will states: "that is to say, one-fourth thereof to the right heirs of my said late husband, Sajan Mi'r Alli, for the time being, one-fourth to be disposed of in charity as my executor shall think right, and the remaining two-fourths to my *own heirs* and legal representatives according to the laws and usages prevalent among the Khojá Muhmmadans." *Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports, 72. Emphasis added.

the death of Sajun Mir Ali, Gangbai became entitled to a share of his estate, notwithstanding his will.⁷⁸

The first plaintiff, Hirbai, filed a bill against the widows, Sonabai and Rahimutbai, to “obtain a declaration from the Court that she, as a Mahomedan female, is entitled to the share in distribution of her father’s property which is ordained in the Koran.”⁷⁹ One witness suggested that it was upon hearing the Koran being read at either a funeral or a marriage, that led to the decision by the daughters to sue for their rights of inheritance.⁸⁰ Supporting her plea was Baqir Khan, the brother of the Aga Khan I, who recommended “that the law of Islam should be followed by the Khojas.”⁸¹

While there are no records available which provide any statements made by the Aga Khan on this matter at the time, in a later case⁸² he is ascribed with the motivation that he “desired to make the Khojas more just and liberal towards their females.”⁸³ It was suggested that the Aga Khan wished to apply Muslim law “which gives a right of succession to women.”⁸⁴ The lawyer who made these assertions then went on to praise Islam with: “It is one of the great glories of the religion of Mahomet that he did so much to raise the position of women among the idolaters of the ancient world.”⁸⁵ While one could debate whether Islam in the nineteenth century did much to raise the position of women, certainly in the Aga Khan’s family, women were accorded positions of prestige and respect. The Aga Khan I had, for example, invested in his grandmother, Marie Bibi, the authority to represent him in India while he was in Persia and deal with the earlier dispute over tithes from the Khoja community. To have a daughter desire to gain her portion of inheritance under Muslim law would have been an entirely acceptable proposition to the Aga Khan I. The Aga Khan’s support for this cause was also consistent with later efforts to harmonize Khoja practices and to try and bring the community more in line with conventional Shi’a traditions, including those related to

⁷⁸The Telegraph and Courier 24 June 1847, 599.

⁷⁹Perry, Oriental Cases, 111.

⁸⁰Testimony of Hubah Ebraim, The Telegraph and Courier (24 June 1847), 599.

⁸¹Howard, The Shia School of Islam, 99.

⁸²Aga Khan Case (1866).

⁸³Howard, The Shia School of Islam, 73.

⁸⁴Howard, The Shia School of Islam, 73.

⁸⁵Howard, The Shia School of Islam, 73.

inheritance rights for women.⁸⁶ Hence, the Aga Khan had an opportunity with this case to exercise his authority and introduce an Islamic practise to undermine what he considered heretical Hindu influences on his followers.

Sonabai and Rahimatbai, the widows, responded by arguing that the Khoja community was an “exclusive sect or cast[e] of Mahomedans.”⁸⁷ They went so far as to assert that the Khojas were “separate and distinct from other bodies or sects of Mahomedans.”⁸⁸ They argued that the Khoja caste had laws and customs which differed from that of other Muslims and were instead governed by “laws and customs peculiar to themselves.”⁸⁹ The widows’ position was that the Khoja custom of inheritance deprived daughters of the right to inherit their fathers’ property. Provisions were made for daughters only when they were unmarried. Under these circumstances, unmarried daughters had the right to maintenance and to expect a sufficient sum to pay for their dowry and other marriage related expenses, but nothing more. Married daughters, like the plaintiffs, could expect nothing from their fathers’ estate as they were no longer his or his family’s responsibility.⁹⁰ Though they did not explicitly state that the community inheritance practices were Hindu, there were no objections to such a conclusion.

The widows were supported by the *barbhai* faction, led by Habib Ibrahim. The *barbhais* had an interest in participating in any forum in which they could voice their opposition to the Aga Khan’s interference in caste affairs. Later commentary on the case highlighted the contradictions inherent in the *barbhai* stance. The dissenting party, on the one hand, sought to weaken ties with the Aga Khan I through declaring themselves to be orthodox Sunnis, yet, on the other hand, supported the continuance of a Hindu ‘legal’ system for the community. Such “impudence” and “hypocrisy” as one lawyer described it, was later used to undermine the reformers’ cause in the 1866 Aga Khan Case.⁹¹ At this point, however, the

⁸⁶It needs to be noted that the petition signed in 1865 regarding customs for the community, renunciation of Hindu practises, and a commitment to follow only Shi’a Isma’ili customs as outlined by the Aga Khan was universally ignored in the courts which continued to apply Hindu laws of inheritance to the Khoja community. Certain members of the community gradually began to observe some aspects of Muslim laws of inheritance and succession, as will be seen in Chapter Five.

⁸⁷Perry, *Oriental Cases*, 111.

⁸⁸Perry, *Oriental Cases*, 111.

⁸⁹Perry, *Oriental Cases*, 111.

⁹⁰Farhad Daftary, *The Isma’ilis: Their History and Doctrines* (Cambridge: Cambridge University Press, 1990), 515.

barbhai argued that the Khoja community was not governed by standard notions of Islamic law, and their leader, Habib Ibrahim, explicitly stated in his court testimony that the Khoja community was governed by Hindu law in matters of inheritance and succession.⁹²

What is paradoxical about such a position was that the widows denied 'female inheritance,' yet at the same time were asserting their *own* right to manage the estate under question. The courts and reports of the case accept this language of 'female inheritance' essentially being equated with a daughter's right to inherit.

The Evidence

The task before the court was to determine which argument was the most compelling and whether the Khoja community was sufficiently distinct as to have laws of inheritance contrary to Muslim law as understood by the courts. The case was heard over two days.⁹³ Much testimony was given with regard to the customs and practices of the community. Reference was later made to how little time was taken to provide evidence and examination for such an instrumental and pivotal case.⁹⁴

Judge Perry referred to his witnesses as "comprising the chief and most intelligent members of the Khoja cast[e]".⁹⁵ These men were questioned as to the origins of the Khoja community, its history, the habits of its members and their religious opinions.⁹⁶ In particular, they were to address the matter of a daughter's right to inherit from her father in the absence of a near male relation such as a son or brother.⁹⁷

In the testimony provided in the report of the proceedings, a profile emerges of the

⁹¹Howard, The Shia School of Islam, 73.

⁹²Testimony of Habib Ibrahim in The Telegraph and Courier (24 June 1847), 599.

⁹³June 19 and 20, 1847. As reported in Perry, Oriental Cases, 110 and The Telegraph and Courier (24 June 1847), 599.

⁹⁴*Jan Mahomed v. Datu Jaffer* (1913) 38 Indian Law Reports, Bombay Series 448. Judge Beaman's decision in this Khoja case and a subsequent Kutchi Memon case, *Advocate General v. Jimbabai* (1915) 17 Bombay Law Reporter 799, had considerable impact. Vaccha credits his rulings as the turning point for both communities, hence a precursor of the later move to have them governed by Muslim law with the 1937 Shariat Act. P. B. Vaccha, Famous Judges, Lawyers and Cases of Bombay (Bombay: N. M. Tripathi, 1962), 92.

⁹⁵Perry, Oriental Cases, 112.

⁹⁶Perry, Oriental Cases, 112.

⁹⁷The Telegraph and Courier (24 June 1847), 599.

witnesses. Most witnesses were engaged in some form of trade with other parts of Western India, East Africa, and even China and England. Whether they could be considered truly representative, though, is arguable. The majority were later signatories to a petition which protested the authority of the Aga Khan and, in particular, the right of his followers to prevent the signatories access to the burial grounds and *jama'at khana*. In other respects, several individuals providing testimony in the Female Inheritance cases appear to have been members of the *barbhai* faction and a primary witness, Habib Ibrahim, was the leader of the *barbhai*.⁹⁸ This possible affiliation was a point overlooked by the lawyers and judges involved in the case, though Perry was aware that there were disputes within the community.⁹⁹

Perhaps an entirely different conclusion can be reached regarding the testimony provided by the witnesses -- one that provides insight into just how *little* influence the Aga Khan actually had over the traditional practices of the community at this time. While the majority were content to acknowledge his position as their spiritual leader, even willing to pay him a religious tithe, the *dasoondh*, they were not so willing to accept his interference in vital family matters such as inheritance.

Perry's own observations on the community were unflattering. While he in one breath depicted his witnesses as the more important and intelligent members of the community, he goes on to speak in quite derogatory language about their deficiencies. He described the community as having never "emerged from the obscurity which attends their present history."¹⁰⁰ He stated that their numbers in Bombay were approximately 2,000 at the time of the case, with most men's occupations being "confined to the more subordinate departments of trade."¹⁰¹ He bemoaned their ignorance and illiteracy. He articulated a frustration with their religious opinions -- painting a picture of a community so utterly ignorant that though they

⁹⁸Key issues of the *barbhai* were reflected in the testimony of Habib Ibrahim, Cassum Natha, Haji Hassum.

⁹⁹Perry mentioned the friction between some Khojas and the Aga Khan in: "[T]heir chief reverence... is reserved for Agha Khan, ... But even to the blood of their saint they adhere by a frail tenure; for it was proved, that when the grandmother of Agha Khan made her appearance in Bombay some years ago, and claimed tithes from the faithful, they repudiated their allegiance, commenced litigation in this Court, and professed to the Kazi of Bombay their intention to incorporate themselves with the general body of Mussalmans in this island." Perry, *Oriental Cases*, 113-4.

¹⁰⁰Perry, *Oriental Cases*, 113.

¹⁰¹Perry, *Oriental Cases*, 113.

claimed to be Muslims, there was no evidence of their knowing anything about what Perry believed to be the markers of Muslim identity.¹⁰²

He compared the Khojas unfavourably with Kutchi Memons, the other community for which he was called upon to decide a similar issue and chose to render a joint judgement. He noted that Memons went on pilgrimages to Mecca and characterized them as more orthodox Muslims than the Khojas, and “in every way their superiors, so far as wealth, numbers, and learning are concerned.”¹⁰³ By contrast, the Khoja made pilgrimages to the Aga Khan, visits to Hindu shrines or Sufi tombs -- actions that were considered by Perry to be insufficient observances and hardly the markers of Muslim faith.¹⁰⁴

In his introduction to the cases, Perry explained that both communities, Khojas and Memons, were “proved to be settled for the most part in Hindu countries, principally Cutch and Kattiawar.” In terms of Khoja beliefs and understanding of their history, he noted that it was believed that the Khojas “had been converted from Hinduism about three or four hundred years ago.”¹⁰⁵ He chose neither to support or deny the assertion, but put forth a theory -- the strength and influence of Hinduism was so pervasive that regardless of whether either group were originally Muslims or converted to Islam, they were bound to absorb a considerable number of Hindu practises and beliefs.¹⁰⁶ Hence, “[t]he rule of succession, which prevailed amongst them, was nearly analogous to the Hindu rule of succession.”¹⁰⁷ If Hinduism was such a pervasive influence, one wonders that any vestiges of Islam or Muslim law existed in India!

The testimony gave many examples of how Khoja families made decisions of

¹⁰²Perry, Oriental Cases, 113-4. Perry put considerable stress on the fact that the witnesses could not read or write Arabic, nor did they go on *hajj* to Mecca.

¹⁰³Perry, Oriental Cases, 115.

¹⁰⁴Perry, Oriental Cases, 113-4.

¹⁰⁵Perry, Oriental Cases, 110.

¹⁰⁶Perry stated: “[T]heir religion Mahomedan; their dress, appearance, and manners, for the most part, Hindu. These latter facts, however, do not warrant the conclusion being drawn, if such conclusion is necessary for the decision of the case (and I think it is not) that the Khojahs were originally Hindu, for such is the influence of Hindu manners and opinions on all casts and colours who come into connection with them, that gradually all assume an unmistakeable Hindu tint.” Perry, Oriental Cases, 112. Perry went on to suggest that this phenomenon led him to “compare it with one somewhat similar in the black soil in the Deccan, which geologists tell us possesses the property of converting all foreign substances brought into contact with it into its own material.” Perry, Oriental Cases, 113. He thus lent an air of inevitability to the cultural heterodoxy of the community.

¹⁰⁷Perry, Oriental Cases, 110.

inheritance. While the overwhelming majority provided evidence that women, both daughters and widows, were disinherited when a near male relation survived, there were cases where fathers attempted to ensure that their daughters had control of their property rather than more distant male relations. For example, in one case, Hassoon Syed stated that a Natta Dhosa left two daughters and bequeathed his property to them around 1835.¹⁰⁸ Even though the father left his property to his daughters, Hassoon Syed stated that ‘the caste’, meaning the Khoja *jama’at*, “took charge of the property, and delivered it over to the male relation.”¹⁰⁹ As Natta Dhosa had no brother, it was presumed that the male relation was an uncle. Hassoon Syed stated categorically that while the “caste has full authority to give daughters the whole or any part of the property,” and no particular rule was followed in the disposal of Natta Dhosa’s property, typically men, not women, inherited property.¹¹⁰

However, a different witness noted that there was a case in which daughters appealed to the *jama’at* regarding their inheritance of family property. The witness was Mahomed Danea, the caste community leader or *Mukhi* of the *jama’at khana*, and a former partner in Sajan Mir Ali and Co. -- the firm formed after the death of Haji Mir Ali and run by the widows of both brothers until it was dissolved “because we could not agree.”¹¹¹ The witness stated that he recalled an instance when the custom of denying a daughter’s rights of inheritance was disputed. Significantly, when it came before the community assembly, the *jama’at khana*, the decision was made in favour of the daughters and the “property was handed over to them.”¹¹² However, despite this one contradictory case, the *jama’at* and the majority of the witnesses supported the assertion that generally, daughters, and particularly married daughters, did not have a right to expect a portion of their father’s estate.

To Perry, Hubib Ibrahim was clearly the most convincing witness and he accepted Ibrahim’s every assertion as the norm for the community. Habib Ibrahim outlined the “rules

¹⁰⁸The testimony suggested that the event occurred 12 years prior to the Khoja Female Inheritance Case, hence approximately 1835, though this cannot be asserted with great certainty.

¹⁰⁹It should also be noted, though, that there was an indication that both daughters were young and that, along with their father’s estate, they too were “delivered over to the male relation” for rearing. The Telegraph and Courier (24 June 1847), 599.

¹¹⁰The Telegraph and Courier (24 June 1847), 599.

¹¹¹Testimony of Mahomed Danea, The Telegraph and Courier (24 June 1847), 599.

¹¹²Testimony of Mahomed Danea, The Telegraph and Courier (24 June 1847), 599.

of descent” for the Khoja community as follows:

[O]n the death of a father, if he leaves a son, he inherits, if more than one, they share their father’s property. Married daughters remain in their houses, unmarried, the expenses of their marriage are paid. Widows are maintained by the sons.¹¹³

Habib Ibrahim went on to state that if a Khoja died and left a widow and married daughter, the widow inherited the property, and the daughter received nothing. If an unmarried daughter was left, the daughter was to be married according to the state of her father, at the expense of the estate, to which the widow succeeded.¹¹⁴ And while these rules were not written down, he argued that any dispute is decided “according to the customs prevailing from time immemorial, that is according to Hindoo customs.”¹¹⁵

Other witnesses provided similar testimony, but did not explicitly equate their customs of inheritance with that of Hindus customs. For example, Mhandjee Mahomed clearly outlined what he considered to be *de facto* laws of succession. He began by acknowledging that though there was no “particular laws of succession,” if there was a son, then he would be heir. Daughters were only “entitled to get themselves married when their father dies.” When only daughters were left, “the widow gets the property, and gets the daughters married.” He agreed with a previous witness, Hassoon Syed, that the *jama’at* had the right to decide how the property was to be disposed in such cases. The first priority was to use the property to cover funeral expenses, then it could be handed over to the daughters, or to any male relations.¹¹⁶ The *jama’at* had the right to “dispose of the matters,” particularly if there was a dispute. He stated that decisions depended on the situation and there was no written regulations to guide decision-makers. He provided an example: if a man died, leaving behind both a son and a brother, if the two lived together, then both would inherit. If they lived

¹¹³Testimony of Hubah Ebraim, The Telegraph and Courier (24 June 1847), 599.

¹¹⁴Habib Ibrahim provides examples. In one, a fellow by the name of Danjee Paroo died, leaving his estate to his brother, Alloo Paroo. Danjee Paroo’s widow lived with the brother and was supported by him until she eventually remarried. After her marriage she received nothing from either the brother or any property from her deceased husband’s estate. He provided another example of Tarroo Bhanjee, who died approximately 25 years previously (1822), left a brother, a son and two daughters. His son and brother, who lived together, jointly shared the property. The daughters received nothing and could only expect to have their marriage expenses defrayed. Testimony of Hubah Ebraim, The Telegraph and Courier (24 June 1847), 599.

¹¹⁵Testimony of Hubah Ebraim, The Telegraph and Courier (24 June 1847), 599.

¹¹⁶The Telegraph and Courier (24 June 1847), 599.

separately, and there was a dispute, then the caste had the right to make a decision binding on all parties.¹¹⁷

Prior to this case, all decisions regarding such disputes were made by holding a community meeting and discussing the matter. Caste meetings were held approximately four times a month. Mhandjee Mahomed stated that, out of a community of approximately seven hundred Khoja families living in Bombay in 1847, the most numerous meetings he could recall had approximately 1600 or 2000 people in attendance. The meeting place, the *jama'at khana*, typically held around one thousand people. At the largest celebrations, like a feast, up to two thousand to two thousand five hundred people could participate.¹¹⁸

The *jama'at khana* acted as the equivalent of Hindu and other community's *panchayats*. It was the traditional community method to resolve all conflicts for matters concerning personal laws and family disputes, a point clearly supported by all Khojas testifying in this case. Appealing to the colonial courts was a new and different strategy and proved to be more binding on the parties than the more flexible local community body.

The Judgement

Perry's judgement addressed five specific issues. The first issue concerned determining the right of succession within a Muslim sect. The second issue regarded whether the court could accept a Khoja 'custom' contrary to the rule of succession in the Koran, but legally valid in all other respects. The third issue Perry raised was the problem of sources of customary law. The fourth issue was deciding if a law could be valid if it was at variance with a text believed to be divine, such as the Koran, which was considered an integral part of the religion. The fifth issue was a comparison between how British law might handle legal problems concerning Muslim sects and how Jewish communities were treated under Roman and European law.¹¹⁹

¹¹⁷Testimony of Mhandjee Mahomed, The Telegraph and Courier (24 June 1847), 599.

¹¹⁸The Telegraph and Courier (24 June 1847), 599. It is interesting to note that Perry concluded that there were approximately 2,000 Khojas in Bombay. Hence if the numbers in this testimony were accurate, feasts then had the entire community involved with many guests or the actual number of Khojas were higher than presumed by the judge. It is also conceivable that Mhandjee Mahomed overestimated the numbers at large meetings.

¹¹⁹Perry, Oriental Cases, 110.

1. Right of succession in a Muslim sect

Based on the testimony of the witnesses, Perry concluded that there was little question that the Khoja community followed a custom quite contrary to a strict interpretation of Muslim law in matters of succession and inheritance. He supported the notion that their custom more closely resembled that of Hindu law than that of Islam. Particularly in light of his belief that the community held Hindu-influenced beliefs, this seemed to him the only logical conclusion.¹²⁰

Perry accepted the Khoja custom of denying females “any share of their father’s property at his decease.”¹²¹ Perry concluded that women were, hence, not entitled to “any benefit whatever except, if they should be unmarried, to maintenance out of the estate, and to a sufficient sum to defray the expenses of their marriage according to their condition in life.”¹²²

Part of the cases rested on whether or not the giving of jewels amounted to recognition and confirmation of the will of Sajun Mir Ali, according to the rules of Muslim law.¹²³ Rahim Wijjor, a Khoja in the service of the defendants, Sonebai and Rahimutbai, testified that he was present when the jewels were given to Gangbai.¹²⁴ In his judgement, Perry decided that “the fact may be passed over without further notice,” as “the simple act of receiving jewels tendered to them by their elders in the family amounted to no compromise of their just and legal rights.”¹²⁵ He reached this conclusion “on looking at the sex, the tender age, and the helpless condition of these young women.”¹²⁶ Apparently he did not feel that their “sex, tender age, and helpless condition” merited the application of Muslim Law and a portion of their respective father’s estate.

2. Validity of custom and the courts

At one point in the discourse, Perry touched briefly on the issue of whether the British

¹²⁰In describing the *Das Avatar*, a book which Perry states as being “the only religious work of which we heard as being current amongst them,” appeared to Perry, in reading the translation made by the court interpreter, to be “a strong combination of Hindu articles of faith with the tenets of Islam.” Perry, *Oriental Cases*, 114.

¹²¹Perry, *Oriental Cases*, 111.

¹²²Perry, *Oriental Cases*, 111-2.

¹²³Perry, *Oriental Cases*, 114.

¹²⁴Evidence of Rahim Wijjor in *The Telegraph and Courier* (24 June 1847), 599.

¹²⁵Perry, *Oriental Cases*, 114.

¹²⁶Perry, *Oriental Cases*, 114.

courts had a moral obligation to enforce a Muslim daughter's right to inheritance even if her sect did not generally practise the custom, as it was the morally correct decision to make. He made a contrast between the relative position which women held in the Hindu system with that of the Muslim system, and suggested that the policy under a Muslim legal system was "so much more enlarged and beneficial" that it begged the question as to whether "it is the duty of the Court to give effect when the two come in collision."¹²⁷ He noted that "it has been stoutly argued, that this Hindu custom of disinheriting daughters, which has been adopted by these Mahomedan sectarians, is most unreasonable, and that public policy would dictate the adoption of the wiser rule laid down in the Koran, by which daughters are allowed a defined share in the succession."¹²⁸

Perry seemed to be moving in a liberal direction, however he quickly backed off, noting instead his caution regarding the judiciary delving into public policy. In this connection, Perry quoted Mr. Justice Burroughs: "Public policy, is an unruly horse, and if a Judge gets upon it he is very apt to be run away with."¹²⁹ Perry went on to state that since a custom of disinheriting daughters was "not unreasonable in the eyes of the English law," there could be no grounds to object to its application in India, however much he may or may not personally disagree with the exclusion of women from inheritance and property.¹³⁰

What is ironic is that on his return to England, Perry became involved in the formation of and agitation for the extension of married women's property rights.¹³¹ While not an ardent feminist supporter, Perry recognized the unfairness of women's positions with regards to property and inheritance and sought to ameliorate the conditions of married British women through law reform.

One scholar of colonial legal history, Kozlowski, observed that the British were quite content to tolerate the exclusion of females heirs "so long as it pacified the pillars of the imperial and social order."¹³² Particularly with Muslim women, some British judges

¹²⁷Perry, Oriental Cases, 120.

¹²⁸Perry, Oriental Cases, 120.

¹²⁹Perry, Oriental Cases, 120. Clearly, Perry did not, at this point, recognize that he was in fact engaging in such an act of formulating 'policy' by establishing a precedent that affected not only the Khoja community for another 90 years, but many other communities as well.

¹³⁰Perry, Oriental Cases, 120.

¹³¹Lee Holcombe, Wives and Property. Reform of the Married Women's Property Law in Nineteenth-Century England, (Toronto: University of Toronto Press, 1983), 88-93, 97, 102, 158, 174, 208, 253.

concluded that since Muslim women were in purdah, they must be ignorant and completely unable to understand any legal document or matter, even if they were both literate and learned.¹³³ Hence, they had no real need of property rights at all!

3. Sources of customary law

Perry's ultimate concern, however, was not so much the condition of women but whether the "peculiar custom of succession" practiced by the Khoja community could be sanctioned in a British court of justice. His concern was not specifically whether the colonial courts had a legitimate right to interfere in such a personal issue, but instead what laws regarding custom were applicable in this circumstance.

Perry began this line of inquiry by asking "why the various special rules which have been laid down in any particular system, and some of which clearly have no general applicability, should be transferred to a state of things to which they have no relation?"¹³⁴ This question, more than any other, exposes the inherent weaknesses in applying British law to the Indian context. Perry expanded on this line of questioning by asking why "the municipal rules of the English law are to govern a Mahomedan custom any more than the municipal rules of the Roman law" could.¹³⁵

Perry justified the court's judicial authority by arguing that its good judgement must be exercised in the new colonial context. Perry's position was clear when he declared that:

I apprehend that the true rules to govern such a custom are rules of universal applicability, and that it is simply absurd to test a Mahomedan custom by considering whether it existed when Richard I, returned from the Holy Land, which is the English epoch for dating the commencement of time immemorial, or by cases, ... [which] shew that it is a bad custom at Southampton to sell butter by the pound weighing eighteen ounces.¹³⁶

¹³²Kozlowski, "Muslim Women and the control of property in North India", 176.

¹³³Kozlowski, "Muslim Women and the control of property in North India", 177. The judges comment was paraphrased from *Sajjid Husain and others v. Nawab Ali Khan* (n.d.) 4 Oudh Law Reporter : 1ff.

¹³⁴Perry, Oriental Cases, 120-1.

¹³⁵Perry, Oriental Cases, 121. Perry was not alone in referring to Roman law. Derrett explores the use of Roman law in the Anglo-Indian Courts in: J. Duncan M. Derrett, "The Role of Roman Law and continental laws in India" Zeitschrift für ausländisches und internationales Privatrecht 24, 4 (1959), 657-685; reprinted in Derrett, Essays in Classical and Modern Hindu Law, 166-194.

Perry went further by arguing that it was equally absurd to apply English customs to India. However, the principal of accepting a custom found well established in India, and not contrary to English law, was not only reasonable but enforceable, despite a conflict of opinion found amongst various jurists.

It appears to me that if a custom has been proved to exist from time whereof the memory of man runneth not to the contrary, if it is not injurious to the public interests, and if it does not conflict with any express law of the ruling power, such custom is entitled to receive the sanction of a Court of law.¹³⁷

4. Accepting a custom contrary to divine law

Perry's fourth concern was whether any custom which clearly conflicted with the "express text of the Koran" could be "valid amongst a Mahomedan sect."¹³⁸ This was the most compelling reason in favour of applying Muslim law to the Khojas. For if the Khojas were in fact Muslims, did the courts then have to uphold the application of 'Muslim law' to Muslims?

Though not stated as such, Perry essentially tried to tackle the thorny issue of whether the colonial courts had the power to impose the text of the Koran and the *shari'a* on a Muslim sect. He did not attempt to question the interpretation of Muslim law by the courts, and whether such interpretations were appropriate or accurate reflections of the diversity of Muslim communities in India. Equally, he did not address the issue of religious identity, but implicitly used his own definition of Islam and perception of what constituted proper Muslim practices. As the Khojas were quite heterodox in their observances, Perry had fewer qualms abrogating Islamic injunctions regarding women's rights of inheritance.

Perry also neatly sidestepped the whole irony of a foreign European power placing itself in the position of *kazi*, enforcers of the *shari'a*. However, he did acknowledge the significance of his ruling and had a sense of the wider implications of his legal stance, which supported the application of laws contrary to the tenets of Islam for a Muslim sect.

Had the Aga Khan been directly involved in the case, perhaps his position would have

¹³⁶Perry, Oriental Cases, 121.

¹³⁷Perry, Oriental Cases, 121.

¹³⁸Perry, Oriental Cases, 115.

been more influential and Perry would not have been as persuaded by the testimony of the *barbhai* faction. As was noted earlier, the Aga Khan was strongly in favour of the Khoja community observing Shi'a laws of inheritance and succession. The Khoja spiritual leader was later very vocal in his support for abandoning what he viewed as heretical Hindu practices and embracing a specific form of Shi'a Isma'ili Islam – with rules which stipulated specific inheritance rights for daughters. At the time of the case, the Aga Khan was kept away from Bombay to placate Persian fears regarding his interference in imperial matters. While Baqir Khan was left in charge of Isma'ili affairs in Bombay, it is likely that he did not have the same position within the Khoja community to effectively defend such a stance. It is also possible that at the time of the judgement, the support for Ithna 'Ashari Shi'a rules of inheritance and succession was not clearly and explicitly articulated, as was later found in various declarations and petitions by the Aga Khan.

In light of the fact that the Koran and *shari'a* were not fully observed by either the Aga Khan nor the Khoja community, Perry was faced with making a decision based solely on the testimony of the witnesses. The evidence itself was provided in a very short time frame and Perry did not request the Aga Khan's opinion or a *fatwa* on the issue, either directly or in a written form, likely feeling it was a caste matter alone. Perry felt justified and compelled to conclude that if the Khojas and Kutichi Memons in fact followed Hindu customs,

... it would be a monstrous thing that an English Court of justice should be obliged to reverse such a time-honoured custom, and almost to revolutionise the internal economy of the two whole casts [sic], out of some supposed obligatory force in a text called Divine, which neither the Judge nor the parties to the suit believe in.¹³⁹

5. Customs and law

To further support his position on accepting customs specific to local conditions, Perry made an interesting comparison to Jewish practices enforced under Roman law.¹⁴⁰ Perry chose to address the experience of Jewish communities, as he wished to see how a non-Christian community was treated by Roman and later European courts.¹⁴¹ Perry did not find

¹³⁹Perry, *Oriental Cases*, 126.

¹⁴⁰Perry, *Oriental Cases*, 121-8.

¹⁴¹Perry, *Oriental Cases*, 128.

sufficient precedents in British law to definitively make a comparison, but observed that in Europe, Jewish communities have “always had their own law administered to them in every case.”¹⁴²

It is interesting to note that in other sources, Perry expressed less confidence regarding the issue. Perry observed that Jewish law was in a “discreditable state of doubt” and expressed concern regarding the ability of the courts to effectively apply ‘laws’ in such a state of uncertainty and flux.¹⁴³

Conclusion

Given the evidence, Perry’s decision to support the general practice of denying Khoja daughters a portion of their fathers’ estate appears on the surface justifiable and reasonable, given the context and evidence. With the testimony of only one witness supporting a daughter’s right to inherit her father’s estate, and the vast majority favouring male inheritance over that of women, there seemed little recourse but to deny both Hirbai and Gangbai’s pleas.

The problem was that the cases left a judicial legacy far beyond a decision regarding a general custom. Significantly, Perry did not return authority back to the more flexible community decision making body, the *jama’at khana*, but saddled Khojas with the entire body of Hindu law in matters of succession and inheritance. The imposition of Hindu law was not based on any explicit declaration by the majority of the witnesses that Khojas were governed by Hindu law. Only one witness, Habib Ibrahim, equated Khoja custom with Hindu law. This effectively meant that a custom which had no specific ‘religious’ implication became ‘religious’ law as developed by British experts and interpreted by the colonial courts. Hence the Khoja community were to be covered under Muslim law for some disputes and Hindu law for others; often in either instance with the most negative consequences for women in the community.

The cases were instrumental in establishing the application of ‘custom’ to avoid some of the stricter rules laid out in the British interpretation of Muslim personal law. With regards to

¹⁴²Perry, *Oriental Cases*, 128.

¹⁴³27 March 1845, *Parliamentary Papers*, 1847, vol. 43, 656 as provided in Rankin, *Background to Indian Law*, 23.

the Khoja community, though various later cases examined the extent to which Hindu law could be applied to the community, it was not until the promulgation of the 1937 Shariat Act that the whole issue of applying Hindu law to a Muslim community was successfully challenged.¹⁴⁴ For the Memons, much like the Khojas, further litigation defined how, to what degree, and in what instances, they came under the jurisdiction of Hindu law, not whether they should or should not be judged according to Hindu law.¹⁴⁵

However, it was not just these Muslim sects¹⁴⁶ which used an appeal to 'custom' to limit women's rights of inheritance. Other Muslim communities used this precedent to allege that their 'custom' also did not support women's, and in particular a daughter's, right to a portion of the male relation's estate, nor was denial of even limited rights of inheritance as found under Hindu law without challenge.¹⁴⁷ Hindu women frequently appealed to the courts to uphold, extend or define their rights of inheritance with a similar outcome resulting in denial of their rights.¹⁴⁸ Hence, the importance of the issue and these cases went far beyond that of either the cases themselves or the Khoja community.

¹⁴⁴See Appendix IV for an overview of Khoja cases with notes. Khoja cases are also listed in the bibliography.

¹⁴⁵See the bibliography for list of Memons cases. The Kutchi Memons eventually were governed by an Act in 1920 which allowed those Kutchi Memons who wished to be covered under Muslim law in matters of inheritance and succession be permitted to do so after a legal declaration to that effect.

¹⁴⁶Unlike the Memons, the majority of Bohra cases concerned community affairs and the role of their religious leader, with only a few dealing with women's inheritance. For an excellent discussion of female inheritance issues and the Daudi Bohra community, see Ghadially's article: Ghadially, Rehana. "Women and Personal Law in an Isma'ili Shi'ah (Da'udi Bohra) sect of Indian Muslims" *Islamic Culture* 70, 1 (January 1996), 27-51. A list of Bohra cases is provided in the bibliography.

¹⁴⁷I started by first examining cases in the *Indian Appeals* held in the University of Manitoba Law Library and found some cases in which Muslim communities appealed to 'custom' to disinherit women. It was my belief that there may have been additional cases in which women appealed to the courts to uphold their rights of inheritance under Muslim law, yet were denied by reason of 'custom'. Through extensive interlibrary loans with the University of Michigan Law Library, I was able to search through the *Bombay Law Reporter* from its inception to 1935 to find a wide range of cases which support this contention. Secondary literature which also indicate evidence supporting this position can be found in Kozłowski's "Muslim women and the control of property in North India".

¹⁴⁸Examples of Hindu Women, the use of the colonial courts, and their inheritance rights is explored in Delores F. Chew, "Out of the *Antahpur*? Gender Subordination and Social Reform in the Nineteenth Century Bengal" (M.A., Concordia University, 1988). Chew also explores how the issue of unchastity was used to deny maintenance and other rights to widows in "The Case of the 'Unchaste' Widow: Constructing Gender in 19th-Century Bengal" *RFR/DRF* (special issue on *Colonialism, Imperialism and Gender*) 22, 3/4 (Fall/Winter 1993 Automne/Hiver), 31-40. I found numerous cases which also support this in Bombay Province, as reported in the *Bomay Law Reporter*. See also Bina Agarwal, "Gender and Legal Rights in Agricultural Land in India" *Economic and Political Weekly* (March 25, 1995), A39-55. Other related research was reviewed in Chapter One.

Chapter Four

Post-1847 Khoja Female Inheritance Cases:

Precedent in Action

Chapter Four

POST-1847 KHOJA FEMALE INHERITANCE CASES: PRECEDENT IN ACTION

Developments in the Judicial System

The legal position set in motion by the 1847 Khoja Female Inheritance judgement had repercussions for the next hundred years. Further questions regarding women's rights to succession and inheritance arose. These cases were direct results of Judge Perry's decision to accept Khoja custom as being analogous to Hindu law in the specific matter of denying a daughter any right to succession and inheritance.

Other types of conflict affecting the Khoja community came before the courts. Two of the most important of these were the 1851 Great Khoja Case and the 1866 Aga Khan Case discussed earlier. The former erupted over an altercation between the *barbhai* faction and the Aga Khani Khoja community and the conflict was resolved with a compromise 'Declaration of Rights' binding on both groups.¹ The subsequent Aga Khan Case arose over access to burial grounds and community property, and resulted in a ruling that all community property was the personal property of the Aga Khan.² Neither of these cases had any direct bearing on the recognition of specific Khoja customs and application of Hindu law to the Khoja community in personal legal matters, hence, will not be examined further.³ Other decisions not examined in this thesis include those over commercial quarrels, criminal cases, such as fraud or debts, or other miscellaneous issues involving Khoja litigants.⁴ In short, only

¹For more information regarding the 1851 Great Khoja Case, see Chapter Two, 46-48.

²For more information regarding the 1866 Aga Khan Case, see Chapter Two, 50-51.

³Evidence from the Aga Khan case was used to support the contention that Khojas were originally Hindus, thus applying Hindu laws of inheritance was merely consistent with their cultural heritage. *Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports 304.

⁴Examples are: *The Municipality of Bombay v. Ahmedbhai Habibbhai* (1899) 1 Bombay Law Reporter 12; *Ahmedbhai v. Framji* (1903) 5 Bombay Law Reporter 940; *Macleod v. Kisson* (1904) 6 Bombay Law Reporter 995; *In re Indian Arbitration Act re Atlas Insurance Co.* (1908) 10 Bombay Law Reporter 351; *Ahmedbhoy Habibhoy v. Sir Dinshaw M. Petit* (1909) 11 Bombay Law Reporter 366; *Ahmedbhoy Habibhoy v. Sir Dinshaw M. Petit* (1909) 11 Bombay Law Reporter 545; *Sir Currimbhoy Ebrahim v. Municipal Commissioner* (1909) 11 Bombay Law Reporter 1167; *Ahmedbhai Habibbhai v. The Bombay Fire and Marine Insurance Co. Ltd.*, (1913) 15 Bombay Law Reporter 19; *Ahmedbhoy Habibhoy v. Waman Dhondu* (1914) 16 Bombay Law Reporter 72; *Currimbhoy and Company v. L. A. Creet* (1933) 35 Bombay Law Reporter 22; *Trustees of the Sir Currimbhoy Ebrahim Baronetcy Trust v. The Commissioner of Income-Tax, Bombay Presidency* (1934) 36 Bombay Law Reporter 557. Although none of these cases specifically state that the parties were Khojas, related information, such as the names of the participants,

problems regarding personal property and questions regarding the application of Hindu law in matters of female inheritance are studied here. Disputes over gifts, divorce, and maintenance of Khoja women will be considered in the following chapters.

The 1847 Khoja Female Inheritance cases, as has already been established, were very much products of the state of the colonial legal system at that time. Later cases equally reflected the context within which they were decided: whether it be the increasingly rigid way in which precedent and personal laws were applied, or the increasing distance between litigants and those responsible for pleading, defending and deciding their cases. Changes in the system of colonial law after 1862 increased the literal and figurative distance between the applicant and caveator, lawyers and judges. There are obvious implications for the nature of decisions under such conditions.

Political changes too had a tremendous impact on relations between Indians and the British. The 1857 uprising and subsequent direct Imperial control of the sub-continent produced reverberations throughout the entire colonial system, including the judiciary. The most significant such developments were the complete reorganization of the court system, changes in the selection and training of court officials, and the introduction of systematic court reporting. All brought the judicial system in India more in line with British norms, legal culture and traditions, and further from the Indian people who were subjected to the decisions.

Re-organization of the Courts

The organization of the colonial courts changed in 1862 when the government eliminated the distinct but overlapping jurisdictions at the higher level courts. The Supreme Courts, in accord with Mughal traditions, dealt with both civil (*Sadr Diwani Adalat*) and criminal (*Nizamat Adalat*) cases, but also had British-style ecclesiastic and admiralty benches. Under the reformed judiciary, four High Courts in Bombay, Allahabad, Calcutta and Madras absorbed the functions of the earlier Supreme Courts.⁵ The new High Courts had several

companies, dates, indicate that all of these cases were suits for or against Khoja men. A number of other cases found in the Bombay Law Reporter also likely had Khoja participants, but as these cases did not have such prominent members of the community such as Ahmedbhai Habibbhai and Sir Currimbhoy Ibrahim, were not listed here as the degree of certainty that the cases concerned Khojas is considerable less.

⁵This attempt to regularize and simplify the judicial system was later implemented in Britain in 1873. Kozlowski ironically points out that "rationality" and "efficiency" were easier to attain in the colonies than Britain. Gregory C. Kozlowski, Muslim Endowments and Society in British India (Cambridge: Cambridge

distinct branches: civil, criminal, and ecclesiastic, hearing both original and appeal cases, with each court being presided over by a judge.⁶ Appeals of a High Court ruling were heard by a panel of British Lords, resident in Bombay. The final forum of appeal from British India was the Privy Council.⁷ It was also during this reorganization that the last vestiges of the Mughal tradition were eliminated and replaced with British legal traditions and trappings.⁸

Many contemporary commentators and subsequent legal historians have observed that the higher a case went, the more British the entire system became, and thus, the greater the distance between the litigant and the judge.⁹ The subordinate magistrates and lower court lawyers were mostly Indian, with proceedings in the local language. The higher court officers were either British or Indians trained in British institutions. In the High Court, Indian *vakils* or pleaders, at first, only appeared before the Appellate Side.¹⁰ It was considered appropriate that Indian lawyers handle the appeals from the districts as many disputes were regarding land tenure, caste customs and usages, inheritance, succession and partition -- in short, litigation involving issues quite unfamiliar to English lawyers. By contrast, the Original Side Bar was initially almost exclusively English. In this study nearly all cases were considered before the Original Civil side. Until the turn of the century, crucial issues determining custom and the appropriate law applicable to the Khoja community were articulated and decided almost

University Press, 1985), 109.

⁶The branches were called 'sides' and hence cases were heard in the Original Civil, Criminal (Reference or Revision), Appellate (Civil or Criminal), and Ecclesiastical Side. There were also Crown Cases and appeals were before the Privy Council. P. B. Vaccha, Famous Judges, Lawyers and Cases of Bombay (Bombay: N. M. Tripathi, 1962), 112.

⁷The Privy Council had been established by a statute of 1833 as the ultimate appeal from British India. A permanent Judicial Committee was appointed to dispose of appeals. At first, four members constituted a quorum, but after 1843 it was reduced to three members. The Bombay High Court was represented in the Committee by such figures as Sir Richard Couch, Sir Lawrence Jenkins, Sir John Beaumont, all Chief Justices, and by Sir Andrew Scoble, Sir George Lowndes, Sir D. F. Mulla and Mr. M. R. Jayakar, all lawyers from the Bombay High Court. Judgements rendered in the Privy Council were binding on all courts in India. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 48-9.

⁸One example of this was that the earlier courts' Persian titles disappeared and were replaced by British titles. British influence on symbolic aspects of legal practice was demonstrated in areas such as the use of "M'Lords" and "my learned friends," the gowns of the judges or lawyers, and the architecture of the court buildings which served to impart both British forms and traditions.

⁹For example, Haridas Nanibai, a talented lawyer and then judge, vigorously critiqued the colonial legal system on these and other grounds. Later scholars like Kozlowski observed: "As cases passed upward to the High Courts on appeal, they entered a realm in which the distance between judge and litigant was even more pronounced." Kozlowski, Muslim Endowments and Society in British India, 114.

¹⁰The earlier *Sadr Diwani* and *Faujdari Adalat* were merged to become the Appellate Side of the High Court.

exclusively by European barristers and judges.

In all sides of the High Court, English was the only language permitted, with all arguments and evidence translated into it. The elimination of any higher court held in the vernacular fostered an increasingly large gap between the litigants and the forum within which their disputes were heard.¹¹ It is obvious that this system, by its very nature, was highly problematic and inherently disadvantaged all Indians who came before it. At the higher levels, Indian men and women were handicapped by language barriers as none of the proceedings took place in their own languages. They were also bound by decisions made by mostly European men, and represented by other men who were trained in a foreign system and often unfamiliar with the Indian cultural context -- at best, ill informed and at worst, prejudiced.¹²

The most obvious example of this distance between judge and litigants was the “paper book.” This “book” contained the printed opinions of the magistrate, the edited transcripts of testimony of some witnesses, and any additional documents thought to be of interest or importance to the case.¹³ These papers were all translated into English. The preparation of these books formed a substantial portion of the, quite considerable, cost to the appellants and respondents. Other expenses incurred included stamp charges,¹⁴ a significant form of taxation in India, and, of course, attorneys’ fees. In an appeal, generally no new oral testimony was heard and the “paper books” provided all the material on which justices decided

¹¹ All High Courts except Bombay immediately adopted an English only policy in 1862. In the Bombay High Court a compromise was reached in 1865 as an interim measure whereby if one of the parties to the suit objected to English only proceedings, translation must be provided. This was only in the designated vernacular court, established to absorb the court officials from the previous *Sadr Diwani* and *Nizamat Adalats*. However, even this compromise was shortly thereafter phased out. Vaccha, Famous Judges, Lawyer and Cases of Bombay, 226-7.

¹² It is significant to note that there were no practising women barristers in Bombay until the 20th century. Even then, the first woman lawyer, Mithan Tata, limited her work to advising women in *purda* on legal matters, not personally representing her clients before the court. Another female solicitor, Cecilia Clementina Ferreira enrolled in the Bombay High Court March 24, 1933. However these two were the exceptions and the discourse in the courts was decidedly male, particularly telling when women were parties to the suits before the courts. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 120-3.

¹³ It is important to note that not all witnesses testimony was considered necessary to include in these “paper books”. Hence there was room for considerable bias and selective censoring of evidence at all levels.

¹⁴ The stamps were and are literally like postage stamps. Stamps continue to be required today and are utilized with great flourish and ceremony by court officials. In preparing the documents for the registration of our intention to marry, and then for the documents for the marriage itself, my husband and I needed to have everything typed and signed on special paper and affixed with the appropriate stamp. This system of stamps was also used for legal documents for my application for an Indian residency visa in 1996.

a case.¹⁵

As noted previously, under the East India Company very little legal training or information was provided, except for a few lectures on British law. Instead, the Company courts employed Muslim and Hindu legal ‘experts’. When these ‘experts’ were retired in 1864, judges and lawyers had to rely upon translations of Muslim and Hindu law, personal experience, if any, and precedent.¹⁶ Even the Indian lawyers who eventually became judges often did not serve as ‘living sources’ about Indian custom or personal laws. This was understandable, as the men who entered a profession in the colonial courts were generally from landholding families and “modern” by education, with little or no familiarity with religious training in the *shastras* or the *shari’a*.¹⁷ However, with their general understanding of society and traditions, many of these lawyers and judges influenced the courts in less tangible, but significant, ways.¹⁸

Under the new system, judges or lawyers received little or no significant prior training in the personal laws of the various Indian communities. By the end of the nineteenth century, a bachelor’s degree and a knowledge of English was sufficient to qualify Indians for an appointment in provincial judicial services. British Indian Civil Service (I.C.S.) men who served as subordinate judges received no special judicial training, only a short course in law which was a part of the regular I.C.S. program of study in England.¹⁹ This course paid

¹⁵Kozlowski, *Muslim Endowments and Society in British India*, 111.

¹⁶As was noted in chapter three, there were considerable biases with the selection and translation of sources of Hindu and Muslim law. Problems with the interpretation and administration of what was determined to be Hindu and Muslim personal laws theoretically meant that all communities were governed by standardized notions established in the accepted translations.

¹⁷Kozlowski reviewed the records and backgrounds of three prominent nineteenth century Muslim judges, Amir Ali, Abd ur-Rahim and Faiz Badr ud-din Tyabji. Based on his study, Kozlowski stated that: “Amir Ali and the others did not come from families which preserved that learning. They were landholders by background and “modern” by education. The effects of the latter can be seen in the textbooks they wrote. Their format followed that of law books in English. “*Shariah*” received relatively little attention apart from some Arabic quotations. The reported cases of the Anglo-Indian courts were their primary source. Amir Ali’s texts contained many Arabic and Persian quotations, but he always translated them with the terminology of British law. Not many traditionally educated Muslims accepted Amir Ali’s claim to authority in matters of *shariah*. Shibli Numani, for example, dismissed Amir Ali as an ignoramus who knew only enough Persian to impress an Englishman.” Kozlowski, *Muslim Endowments and Society in British India*, 117.

¹⁸Here I disagree with scholars like Kozlowski who conclude that native lawyers and judges had little real influence on the decisions of the High Courts. My reading of Bombay High Court cases demonstrates instead a marked difference in cases where able native lawyers and judges proved more discerning in their understanding of the issues involved and considerably more nuanced in their arguments and conclusions, adding a complexity and heterodoxy to colonial law which was often overlooked or absent in the rulings of their British counterparts. This is not, however, meant to be an exaggeration of their influence as it is equally clear that native lawyers and judges played within the colonial rules and actively upheld the colonial legal system.

more attention to the laws of evidence and procedure than anything else, and did not in any way prepare I.C.S. men for the intricacies of the cases which came before them.²⁰

After a few years of service in India, each I.C.S. officer faced a choice between taking either an administrative or judicial line of service. Of the two, the administrative line was considered more prestigious, with the “possibility of a commissionership or a post in a provincial or viceregal secretariat.” By contrast, the judicial line held little more promise than a future of “dim and dusty courtrooms.”²¹

The Justices of the Higher Courts generally came from the British Bar. The training received was not particularly rigorous²² and these gentlemen were “almost completely ignorant of Indian institutions and traditions.”²³ A few officials and Indian lawyers expressed concern that the British training method of merely attending the Inns of Court²⁴ was insufficient to qualify one for a legal career in India. Many instead believed that the legal education given in Indian universities was superior, especially with regard to the indigenous legal systems.²⁵ Such criticism, however, did nothing to change training, qualifications, or a system in which men from Britain could preside over the higher courts of India, knowing nothing substantive about Indian traditions, customs or languages.

¹⁹Kozłowski asserts that: “Those who opted for the rigours of a life in district courts had only a basic knowledge of the law.” Kozłowski, Muslim Endowments and Society in British India, 113.

²⁰Philip Mason, A Shaft of Sunlight (New Delhi: Vikas Publishing House, 1972), 71-2.

²¹Kozłowski, Muslim Endowments and Society in British India, 113.

²²Only after H.S. Maine’s reform of legal training in England in 1850, did students have to attend lectures and write examinations at the “Inns of Court.” Professor William Holdsworth described the poor state of British legal education before 1850 as “A very melancholy topic... The law student was obliged to get his knowledge of law by means of undirected reading and discussion and by attendance in chambers, in a law office or in the courts.” W. S. Holdsworth, A History of English Law (London: Methuen, 1938), xii, 77 as quoted in George Feaver, From Status to Contract. A Biography of Sir Henry Maine 1822-1888 (London: Longmans, Green and Co. Ltd., 1969), 19-25. Although both Oxford and Cambridge established chairs in law in the late 18th Century, these individuals were described as “time-servers, more interested in keeping their London practice than teaching the law. With few exceptions, they were underpaid and uninterested.” Kozłowski, Muslim Endowments and Society in British India, 120.

²³Kozłowski, Muslim Endowments and Society in British India, 115.

²⁴Kozłowski states that: “The Inns were not schools, and had begun life as residence halls.... Until the middle of the nineteenth century, lawyers attended no lectures and took no examinations. The only requirement for an aspiring barrister was that he eat a prescribed number of meals at the Inn.” Kozłowski, Muslim Endowments and Society in British India, 120. For anecdotal and other information on the Inns of Court, see: Cornelius Comegys, A Summer Sojourn Among the Inns of Court (1920; Buffalo: Dennis & Co., 1960) and J. Bruce Williamson, The History of the Temple, London, (London: William Clowes and Sons, 1924).

²⁵(UP) JP Civ. Confidential (1911), no. 331, letter of Lord Crewe dated 26 May 1911. Referred to in Kozłowski, Muslim Endowments and Society in British India, 121, fn 61.

By contrast, Indian Universities had law courses, some for one year, others for two years. The subjects studied included: jurisprudence, contracts, torts, evidence, procedure and criminal law.²⁶ In addition, students covered the various codes enacted by the British in India.²⁷ As civil litigation in the Indian courts most frequently concerned property, topics such as property, land tenure and the Indian version of equity were highlighted. The greatest stress was on familiarizing students with the published reports of the courts. Legal precedent held a crucial place in the colonial courts and was the only way, other than by legislation, to modify British interpretations of Muslim and Hindu personal law. Even here, the training, above all, reflected the central role of British law and traditions in the colonial legal system.²⁸

The way in which court cases were reported thus became of central importance. If the British system of legal precedent was to be adhered to, the Courts needed to publish reliable reports of their decisions. Although limited law reporting had taken place since the creation of the Supreme Court in 1774, it was not organized nor consistent, and was largely a result of sporadic private publications by lawyers or judges of their arguments and decisions. One of the earliest and most widely used of these works from the Bombay Court was Perry's Oriental Cases. This lent an inordinate weight to his decisions and role in establishing precedents in the Bombay Presidency. Other sources included inserts and references to decisions in compilations and translations on personal laws, such as Macnaghten's publications on Hindu law (1824) and Muslim law (1825). In Calcutta, there were Morton's Reports from 1774-1841, compiled from the notes of Chief Justices. In the early part of the nineteenth century there were many different reports of Supreme Court decisions published, yet they were far from standardized and often consisted of just a single volume.²⁹ The lower court decisions

²⁶Even in Indian Universities, "only a small part of the syllabus was devoted to the study of Hindu and Muslim laws. Only four textbooks on these subjects were listed and two of these had British authors." Kozlowski indicates the source as (UP) JP Civ. Confidential (1911), no. 331, undated letter of Tej Bahadur Sapru, L.L.D. Sapru's letter provided a topical syllabus and reading list used in Allahabad University's law course. Kozlowski, Muslim Endowments and Society in British India, 121.

²⁷For example, The Indian Penal Code.

²⁸Kozlowski convincingly argues that the predominance of British authors in the Indian legal syllabuses, the subjects studied, and the importance of British-Indian government enactments were obvious expressions of that control. Kozlowski, Muslim Endowments and Society in British India, 121.

²⁹Such reports were: Bignell's Reports, 1830-1831; Fulton's Reports, 1845 (including cases from 1842-44); Montriou's Reports, 1846; Boulnois' Reports, 1853-1859; Gasper's Commercial Cases, 1851-1860; George Taylor's Reports of Cases, January 1847-December 1848; Taylor and Bell's Reports, 1847-1853; and so forth. Nearly all of these pertained to decisions made in Calcutta. Perry's Oriental Cases stood alone for

were reported no more systematically or comprehensively.³⁰

With the establishment of the High Courts, reports were produced for each court by official court reporters.³¹ In 1875, the Indian Law Reports Act heralded the establishment of official court reports, yet these often were costly, incomplete, and published long after the decisions were made. For Bombay, the official report was the Indian Law Reporter, Bombay Series.³² The need for more comprehensive, timely and less expensive reports led to the popularity of non-official publications like the Bombay Law Reporter.³³ With the new system of law reporting, the British legal tradition of precedent was firmly established and re-enforced. Misinterpretation of a previous decision had serious consequences, as will be seen in the application of Judge Perry's decision in future cases concerning the Khoja community.

Khoja Inheritance Cases After 1847

Khoja Female Inheritance Cases between 1847-1863

Several minor problems concerning Khoja female inheritance came before the Registrar and the court between 1847 and 1863. Mention was made of some of these cases in the 1875 case of *Hirbai v. Gorbai*.³⁴ In an examination of the records of the Ecclesiastical Side of the Bombay Supreme Court, ten cases regarding application for administration of Khoja estates were brought forward. Seven were resolved by the Court Registrar as non-contentious in nature, and three by the Court.³⁵ None of these cases were published in the court reports.

The cases resolved by the Registrar were briefly referred to in *Hirbai v. Gorbai*, with additional information noted in testimony regarding these events by Khoja witnesses. All of

Bombay. M. P. Jain, Outlines of Indian Legal History, 3rd ed., (Bombay: N. M. Tripathi, 1972), 6134.

³⁰For the Bombay *Sadr Diwani Adalat*, there was only the one report by Borradaile, a Judge of the *Adalat*, published in two volumes in 1825 and an anonymous publication from 1843, containing cases from 1820-1840. For the Bombay *Nizamat Adalat*, there were only reports of criminal cases from the *Sadr Faujdari Adalat* from 1827-1846 published by Macnaghten. Jain, Outlines of Indian Legal History, 614.

³¹For Bombay, there was the 12 volume Bombay High Court Reports, from 1862-1875.

³²Sir Charles Farran, then puisne judge, was the first Editor of the Indian Law Reports, Bombay Series. He had acted as both Advocate General and judge, and eventually became Chief Justice of Bombay in 1895. He passed away suddenly in 1898. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 67.

³³Jain, Outlines of Indian Legal History, 616-7.

³⁴*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 294.

³⁵*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 300.

these decisions were reached without resorting to a court trial and were considered minor matters. However, they provide interesting insight into the kinds of issues which arose over Khoja female inheritance and how the Registrar dealt with such questions.

The first of the cases resolved by the Registrar was heard in 1855. A Khoja man, Jairaz Dharramsi, died, leaving a widow and four brothers with no issue. One brother applied for administration to Jairaz Dharramsi's estate and the widow entered a caveat. It appeared that as a result of this caveat, some unexpected difficulties arose for the widow -- likely the imminent loss of her residence and seizure of her ornaments. She withdrew her objection and was said to have stated: "I am a woman: where can I go?"³⁶ The property was given to the brother, the widow was given back her ornaments, and she was maintained by the estate until she remarried.³⁷ So, although letters of administration were granted to the brother, it was only after the widow "of her own accord" gave him and the surviving brothers power over the estate. Witnesses in a later case referred to this decision and noted that there was "an essential right by the widow to the property, or, at least, to the management of it."³⁸

Similarly, in the case of Mahomed Alluwany, a brother and widow survived. The brother stated that as he and his deceased sibling shared a joint estate, the widow was entitled only to maintenance. Again, with the consent of the widow, the letters of administration were granted to the brother. In the third case, Pardhan Ravji passed away leaving a widow, infant son and mother. In this case, the mother filed for letters of administration to the estate. The Registrar refused to grant the application until the widow consented. Eventually, the widow agreed and the letters of administration were given to the mother. The fourth case was that of

³⁶From the testimony of one of the brothers, it appeared that she was told that if she did not sign over the power of administration, she would no longer have a place to live. Her husband had lived separately from his siblings, and once she signed over power to the brothers, she was allowed to continue to live in the home, presumably independently. Testimony of Rahimbhoy Dhurumsey in SRO, JD 1880, 31, *H v. G* Hearing, 7.

³⁷It was also assumed that her ornaments were seized during the dispute. When the widow remarried, she was required to return all her ornaments and the brother took possession of her first husband's property. Initially, the widow objected to this, entered a caveat, but withdrew her objection when the brothers arranged to provide her with maintenance. It is notable that she twice objected to the brother's control of the property, and received maintenance of Rs. 50 or 60 per month while married to a completely different man. It demonstrated that Khoja 'custom' was not always followed to the letter and compromises were reached which provided for a widow even after she married outside of the original family. It should be noted that the compromise solution was taken by the parties as a "private arrangement" for life-interest only. Testimony of Rahimbhoy Dhurumsey in SRO, JD 1880, 31, *H v. G* Hearing, 7-8.

³⁸*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports 311. Even the brothers stated that they administered the estate for her until she remarried, thereby revealing an ambiguous understanding of ownership and rights to the property.

Mithu Somji, who left three sisters. Two sisters lived in Kutch, so administration of his estate was granted to the third sister who lived nearest to the property. No objections from any distant male relations were raised. The fifth case was over the estate of Vallubhai Alvany. Alvany was survived by his mother, widow and daughter. Letters of administration were granted, without objection, to the widow. The widow lived with her daughter, son-in-law, their children and, apparently, also her husband's brother. It is significant that the brother never objected to the widow's control of the estate, particularly as its worth was estimated at somewhere between 2 and 4 lakh rupees. The widow was also said to have carried on a trading business with her son-in-law.³⁹ The sixth case took place in 1859. It was regarding the property of Dada Alvann who left a son, six daughters, and a grandson. Letters of administration were given to the son. In 1864, the final case resolved by the Registrar was over the estate of Pachan Punjani. The widow applied for, and was granted, letters of administration to her husband's estate. No objections were raised.⁴⁰

The first of the three cases decided by the Court was heard by Chief Justice Yardley⁴¹ in 1855.⁴² It was a dispute between the widow and brother of Vallu Musani. The brother argued that a Khoja widow was entitled to maintenance only. In accordance with Hindu law, the court found in favour of the brother, as the brothers had shared a joint estate and conducted business together. The widow's consent to the arrangement was eventually obtained. The second case was also decided by Chief Justice Yardley one year later.⁴³ The estate in question belonged to Pirbhai Manji, who died leaving a widow and infant son. Here again the widow sued for management and ownership of the estate. Her application was opposed by persons who alleged that the deceased left a will. This allegation was proved invalid, so they further alleged that the deceased had other relations, specifically a maternal

³⁹Testimony of Ahmedbhoy Hubbibhoy. SRO, JD 1880, 31, *H v. G* Hearing, 15. Also noted by Rahimbhoy Dhurumsey, SRO, JD 1880, 31, *H v. G* Hearing, 6 and 7. Similarly Dhurumsey Kakoo affirmed that the widow enjoyed the use of her husband's estate. SRO, JD 1880, 31, *H v. G* Hearing, 10.

⁴⁰*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports 301.

⁴¹Sir William Yardley (1810-1878) was educated at Shewsbury and called to the bar from the Middle Temple. In 1847, he was appointed as a Puisne Judge at the Bombay Supreme Court. From 1852-1858 he was Chief Justice of the Bombay Supreme Court. C. E. Buckland Dictionary of Indian Biography (1905; New York: Haskell House Publishers, 1968), 463. For more information on the Middle Temple, see: George Godwin, The Middle Temple (London: Staples Press Limited, 1954).

⁴²November 26, 1855.

⁴³February 11, 1856.

grandmother and maternal uncle, and his four sons. In this case, the court decided in favour of the widow, so that she might manage the property as guardian for her infant son. Again, reference was made to the application of Hindu law, particularly as it was believed that, according to Muslim law, the widow would not have been granted guardianship of her son. The final case was decided by Chief Justice Sausse⁴⁴ and Justice Arnould on September 29, 1862. Dossa Nanji left a widow and niece. The widow applied for letters of administration to Dossa Nanji's estate and the niece objected on the ground that the widow intended to sell the property. The court decided in favour of the widow as long as she accept the limitation of Hindu law by which she could not sell or mortgage the property without the consent of the next heir -- the niece.⁴⁵ It is notable that this was the only instance in which a widow's management of property was restricted in any way.

These decisions demonstrate how the Registrar and court dealt with minor conflicts over questions as to who had the right to letters of administration to Khoja estates. They reveal that in no case was administration of an estate granted to a male relation without the widow's permission.⁴⁶ Similarly, a mother was not granted control of an estate without the widow's consent. It must also be noted that, although these decisions provided a general backdrop for the subsequent cases, none were specifically referred to until the 1875 *Hirbai v. Gorbai* case. Also, none of these cases were seen by the court as establishing any significant precedent, even though they dealt with issues which later proved contentious.

The reason for overlooking such remarkable instances in which widows managed estates without restriction, sisters inherited property from their brothers, and so forth, was likely that later judges were either unaware of the previous cases, as they were not published, or chose to not thoroughly investigate earlier disputes, particularly those resolved before the Registrar. The 1862 reorganization of the judicial system may have also been a factor. It is also possible that some judges were aware of some of the cases, but saw no need to refer to the decisions directly. For example, Justice Sausse, who sat on the 1862 Dossa Nanji case,

⁴⁴Sausse was born in 1809 and died in 1867. Buckland *Dictionary of Indian Biography*, 376. Considerable additional biographical details regarding Sausse follow.

⁴⁵*Hirbai v. Gorbai* (1875) 12 *Bombay High Court Reports*, 300-1.

⁴⁶With the exception of the one case where a sister, not a widow, inherited the estate. In that case no mention was made of a widow.

which, for the first time, restricted a widow's right to manage inherited property, was also the presiding judge in the next case, *Gangbai v. Thavar Mulla*, examined here.

Khoja Female Inheritance Cases Revisited: *Gangbai v. Thavar Mulla*, 1863

Gangbai v. Thavar Mulla was the first reported Khoja inheritance case which came before the Bombay High Court after 1847. The 1863 case was directly related to the earlier Khoja Female Inheritance cases and involved many of the same participants. The dispute was between Thavar Mulla, executor of Rahimatbai, widow of Sajan Mir Ali, and Gangbai, daughter of Sajan Mir Ali. As the case concerned the same estate under dispute in the 1847 Khoja Female Inheritance cases, no additional testimony was solicited.

As noted in the 1847 case, Sajan Mir Ali wrote a will in English, leaving administration of the joint estate which he had held with his pre-deceased brother in the hands of their respective widows. The estate in question was described as being of a "very considerable" size.⁴⁷ Sajan Mir Ali's widow and executrix, Rahimatbai, died in 1851, four years after the Khoja Female Inheritance cases.⁴⁸ She also left a will, in English, in which she specified that only one-fourth of the property should go to her husband's heir, that is, his daughter Gangbai.⁴⁹ Half of the estate was bequeathed to her own heirs -- her adopted daughters.⁵⁰ The remaining one-fourth was left for specified charitable purposes, such as the setting up of a school.⁵¹ Gangbai, the plaintiff, petitioned the court for her right, as sole next of kin and heir at law of Sajan Mir Ali, to administration of the entire residuary estate of her father. Gangbai also argued that the bequests made by Rahimatbai were void.⁵²

⁴⁷*Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports 73.

⁴⁸It is not clear why the plaint was brought forward by Gangbai twelve years after the death of Rahimatbai.

⁴⁹Although it was noted in the 1847 Khoja Female Inheritance cases that there was another daughter, and the widow used the plural 'heirs' no mention was made in the *Gangbai v. Thavar Mulla* case of any other heir.

⁵⁰It appears that her adoption of these daughters was unusual. In providing testimony for another case, Soojeebhoy Manockbhoy noted that the only case of adoption, male or female, that he had heard of was by Sajan Mir Ali's widow. He also noted that amongst Khojas there was no religious duty that must be performed by a son. Hence the Hindu tradition of adoption did not apply. Testimony of Soojeebhoy Manockbhoy, SRO, JD 1880, 31, *H v. G* Hearing, 3.

⁵¹The founding of a school by / from the estate of Rahimatbai, widow of Sajan Mir Ali, was confirmed by several testimonies contained in SRO, JD 1880, 31, *H v. G* Hearing.

⁵²*Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports 72.

J. P. Green provided counsel for Thavar Mulla. Green was known to be “very unsympathetic” towards Indians and, due to his racism, his decisions “were warped in cases where the litigants were of the white and dark races.”⁵³ Gangbai’s lawyer, Acting Advocate General J. S. White, was known for his upright character and impatience with bureaucracy, yet did not have a particularly good track record of successfully convincing the courts of the validity of his Khoja clients’ positions.⁵⁴ The case was heard in the Bombay High Court in only one day, August 14, 1863, and the decision was made by the Chief Justice of Bombay, Sir Matthew Sausse, on September 10, 1863.

The primary issue under consideration was whether a Khoja woman’s will was to be constructed according to Hindu law. The next issue was whether a charitable bequest, and specifically a gift made in *dharm*, was valid.⁵⁵ The first issue was dispensed with immediately, as Sausse accepted without question the idea that “the Khoja caste, which, although Muhammadan in religion, has been held to have adopted, and to be governed by, Hindu customs and laws of inheritance.”⁵⁶ The second part of the case rested on the question of whether the charitable and other bequests were valid. White, on behalf of Gangbai, argued that the court should recognize that Rahimatbai must have meant *dharm* in the Hindu religious sense in her will, rather than the English word ‘charitable.’⁵⁷ He noted elsewhere that the

⁵³D. E. Wacha, Shells from the Sands of Bombay. My Recollections and Reminiscences - 1860-1875 (Bombay: The Indian Newspaper Co., 1920), 737-8.

⁵⁴Wacha, Shells from the Sands of Bombay, 737.

⁵⁵The Court Reporter made an extensive note on the issue of ‘*dharm*’. He noted that in the case of *Pranjirandas Tulsidas v. Derkavarbai and others* (1859), Chief Justice Sausse called on the Chief Translator to clarify the meaning of *dharm*. From the translator’s definition, Sausse understood it to mean “religious and charitable objects in general, such as (1) religious practice; (2) another and more limited sense; (3) giving charity in general; (4) the alms themselves.” The Chief Translator further explained that “according to the Hindu Shastris [unspecified] it may be any good work, such as founding any charitable institution for man or beast.” Not satisfied, Sausse then consulted Dr. Wilson, calling him a “very high authority upon Indian languages” (evidently more so than the official translator in Sausse’s view) to explain the word in light of court usage. Wilson explained *dharm* as derived from the Sanskrit word *dri* which means obligation and duty. [I have found no evidence to support this etymology, and it very well may have been incorrect.] Wilson gave nine meanings, with Sausse noting the “7th, virtue, generosity, charity conformable to duty; 8th, justice personified; [and] 9th, the advancement of religion, charity, and benevolence.” Wilson explained that *dharm*’s application in a Will conveyed the idea of “benevolent intention, such as feeding priests and animals, providing wells, roads, medicines, hospitals, &c., all matters which are left to the discretion of the executors by the use of the present expression.” Based on this, Sausse concluded that *dharm* was thus closer to the English word ‘benevolent’, rather than ‘charitable’ as was previously accepted in the court. However, Sausse pointed out that the construction of the word ‘charitable’, as applied to Hindu law, was derived not from Hindu law but rather English Procedure in India, hence governed by British constructions, not Hindu. *Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports 76-76a.

⁵⁶*Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports 73.

court refused to enforce Trusts made thus, as the term *dharm* “embraces many objects which would not be held in English law to be valid charitable use.”⁵⁸ As a result, gifts stipulated as *dharm* could not be “carried into effect.”⁵⁹ White did not appear to have developed any argument in favour of Gangbai’s right to inherit the entire estate. Instead, the court was left with only her written petition which Sausse alluded to in only a cursory manner. This appears to have been a result of Sausse’s discomfort with both the petition and its contents.⁶⁰

In Thavar Mulla’s favour, Green proposed limiting the executor’s discretionary powers so that all charitable acts fell within the English definition of ‘charity,’ thus making moot Gangbai’s objection to the validity of the will on these grounds. Further, while Sausse agreed with Gangbai’s point regarding the invalidity of *dharm*, he felt that as the will was written in English and the executor agreed to administer the funds according to British law, all objections of the plaintiff, Gangbai, must be refused.⁶¹ Any additional questions regarding her rights as sole heir of her father were ignored completely by both her legal counsel and the judge, with the judgement made in favour of Thavar Mulla.

This Khoja case was the first published case that extended the application of Hindu law to the Khoja community. It is notable that even in his language, Judge Sausse applied Hindu terminology to the community. For example, he referred to the Khojas as a ‘caste’ not a ‘sect’, as Perry had made pains to do earlier. Similarly, Sausse assumed that ‘Khoja’ and ‘Hindu’ were interchangeable terms with regards to ‘heir at law.’ Fifty years later, Judge Beaman, in a subsequent Khoja case, drew attention to this imprecise adoption of terminology

⁵⁷Sausse refused to admit the evidence forwarded by Gangbai that suggested that Rahimutbai meant *dharm* and not the limited British legal interpretation of ‘charity’. *Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports, 74.

⁵⁸*Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports 72.

⁵⁹*Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports 73. How exactly White expected this point would further Gangbai’s petition beyond trying to deny the charitable aspect of Rahimatbai’s will is unclear.

⁶⁰Sausse stated that the case was “brought before the Court irregularly by way of petition.” He seemed put off by Gangbai’s claim to the property. He wrote that her petition was made in “very strong words” and she evidently did not accept that her right to the property was in any way limited in the sense recognized by the courts for a Hindu widow in Bengal. This was irrespective of the fact that Gangbai was not a Hindu widow, nor did the case take place in Bengal. This was an example of a clash between Sausse’s perceptions or expectations versus the reality of the individuals and situations before him. *Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports 73, 76.

⁶¹*Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports 73-6. These arguments were presumably based on her petition.

and effectively argued that there was “absolutely no foundation” to support Sausse’s assumptions.⁶² Also, it is important to note that even Sausse admitted that the suit was handled in an irregular fashion, given that the parties were at the court in person and agreed to be bound by his decision even if he did not make a specific legal ruling. While Sausse made no explicit ruling regarding the application of Hindu law to the Khoja community, he implicitly and very clearly did just that -- a precedent that was accepted by future court cases concerning the Khoja community.

Whereas Perry had made a specific judgement on a particular custom with regards to one legal issue and instance in which a Khoja custom was found to be analogous to Hindu law, Sausse simply accepted without question that the earlier judgement therefore meant Hindu law was to be unilaterally applied to the Khoja community in all matters of succession and inheritance. In contrast, Perry had been acutely aware of the thorny problem of legal precedents and had wished to avoid making legal policy in his judgement. While Perry’s judgement had supported the ‘particular custom’ of the Khojas in the specific cases in question, he had noted that this was partially in the absence of “any general enactment” in the British Legislature which would have bearing on such issues.⁶³ Hence, Perry had tried to rule fairly on a particular issue without creating a binding precedent. Sausse showed no such reluctance, and misleadingly and inaccurately credited Perry with establishing that the Khoja community was governed by Hindu customs and laws of inheritance.⁶⁴ Half a century later, Beaman was rightly scathing of Sausse’s judgment in *Gangbai v. Thavar Mulla*, and stated that the case was “interesting because it illustrates the almost hopeless confusion of thought, which prevailed at that time in the Court, over questions of Hindu and Mahommedan law.”⁶⁵

A number of discrepancies existed which undermine Sausse’s facile understanding of the case. The very existence of Rahimutbai’s will is such an example. Rahimutbai had earlier pressed for, and won, recognition of a Khoja custom which denied her deceased husband’s daughters from inheriting a portion of his estate. When it came to the disposition of the estate on her death, Rahimutbai created a will with the full expectation that her heirs would be given

⁶² *Jan Mahomed v. Datu Jaffer* (1913) 15 Bombay Law Reporter 1059.

⁶³ Erskine Perry, Cases Illustrative of Oriental Life and the Application of English Law to India, Cases Decided in H. M. Supreme Court at Bombay (1853; New Delhi: Asian Educational Services, 1988), 129.

⁶⁴ *Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports 73.

⁶⁵ *Jan Mahomed v. Datu Jaffer* (1913) 15 Bombay Law Reporter 1059.

half of the estate. Had she truly felt governed by Hindu law, there would have been no such expectation, as it would have been assumed that the estate was hers for life interest only -- not absolutely -- and would revert to her husband's heirs on her death. Hence, if Gangbai was truly the only heir of Sajan Mir Ali, she would automatically become the administrator of the estate for her life.

It is important to pause and consider the character and reputation of Sausse, as subsequent cases followed his unequivocal application of Hindu law to the Khojas. Sausse's assumptions and inability to distinguish specific nuances involved in the *Gangbai v. Thavar Mulla* case set in motion a legal precedent which saddled the Khoja community with a body of Hindu law which very well may have been neither appropriate, nor an accurate reflection of the state of Khoja affairs and practices. Sausse did not have a strong grasp of Hindu and Muslim law as understood by the colonial courts at that time, nor of Indian culture and the society within which he was living.

Sausse was the last Chief Justice of the Supreme Court and the first Chief Justice of the newly formed Bombay High Court.⁶⁶ He was reputed to be, in polite terms, "the very personification of all that a stern British judge of downright impartiality is and was held in awe by all practising before him."⁶⁷ He was unmarried, Irish, a devout Roman Catholic, and travelled about Bombay in a distinctive carriage with a white quilted cover.⁶⁸ Sausse kept aloof from all 'society', Government House, clubs, and apparently did not even read newspapers. In less polite terms, he was known to be cold, frigid, terse, possessing a temper, unfeeling, exceedingly 'unsociable' and so narrowly focused that he did not care to learn, see or hear anything outside the High Court Bench.⁶⁹

⁶⁶Sausse held the position of Chief Justice of the Supreme Court at Bombay from 1859-1862. Buckland *Dictionary of Indian Biography*, 376.

⁶⁷Wacha, *Shells from the Sands of Bombay*, 250.

⁶⁸Wacha observed that "In those days they maintained not a little the dignity of the judge and some of the obsolete Court traditions of England" Wacha, *Shells from the Sands of Bombay*, 251.

⁶⁹Sausse was quite notorious for his lack of feeling. In 1865 Arthur James Lewis, Advocate General, became unconscious in the court. All attempts to revive him failed and he died, likely from a heart attack. On being informed that the Advocate General had suddenly passed away in the court, Sausse ignored the news and continued hearing what was considered an unimportant case. The Bar expressed their shock at this lack of feeling and recommended adjournment. Sausse responded that he would consult with the other Judges, Anstey and Couch, who had already stopped proceedings in their courts, only after the case before him was concluded. Vaccha, *Famous Judges, Lawyers and Cases of Bombay*, 59, 66-7.

Pomp and personality aside, his judgements depicted a very narrow understanding of indigenous legal traditions and he clearly imposed upon the court his own perceptions of the various Indian communities which came before him. Sausse, on occasion, demonstrated much ignorance of the various religious and cultural traditions and backgrounds of the groups who brought litigation before the courts. Illustration of this can be found in many of his judgements, but a striking example is the famous 1863 Maharaja Libel Case.

Both Sausse and Arnould⁷⁰ were involved in the Maharaja Libel case.⁷¹ Sausse felt emboldened to decree that the “sedulous cultivation of the doctrine of their own godhead [w]as contrary to the Hindu religion.”⁷² Yet Sausse clearly demonstrated an absolute lack of understanding of Hinduism during the hearing of the case, becoming impatient with witnesses, fining and threatening to jail any witness who did not respond as he wished.⁷³ By contrast, Arnould listened patiently and praised the reformers who brought the issues involved to the press.⁷⁴ Arnould concluded that “what is morally wrong cannot be spiritually sound.”⁷⁵ Arnould’s understanding of both the communities and issues was much deeper, more sympathetic and also closer to that of the parties involved.

The different backgrounds of the two judges had significant bearing on the way they interpreted the cases heard and how they rendered judgments.⁷⁶ It is obvious that Sausse

⁷⁰Judge Arnould presided over the 1866 Aga Khan case.

⁷¹Amrita Shodhan’s doctoral dissertation “Legal Representations of Khojas and Pushtimarga Vaishnava Politics as Communities: The Aga Khan Case and the Maharaj Libel Case in Mid-nineteenth Century Bombay” (PhD diss., Dept of South Asian Languages and Civilizations, University of Chicago, 1995) ably contrasts and compares the legal and community issues of both the Maharaj Libel Case (1863) and the Aga Khan Case (1866).

⁷²Christine Dobbin, Urban Leadership in Western India. Politics and Communities in Bombay City, 1840-1885 (Oxford, Oxford University Press, 1872), 70.

⁷³In questioning one witness as to whether the Maharaj was considered a God, the witness replied that the Maharaj was their *guru*. Not satisfied, Sausse intervened “Tell the witness if he does not answer the question, he will be sent to jail.” The witness requested clarification of the question and the interpreter explained. The witness again stated that a *guru* is a *guru*. Sausse again intervened, threatening jail. The witness stood firm and refused to equate the Maharaj with God, but called him a *guru*. Other related issues noted in Shodhan’s dissertation clearly demonstrate how Sausse manipulated the questioning to provide the evidence he sought or expected, and his overall understanding of Hinduism and Hindu customs was, at best, weak. Shodhan, “Legal Representations of Khojas and Pushtimarga Vaishnava Politics as Communities” (PhD diss., Chicago, 1995), 213-4. There is little to indicate that his understanding of Islam and Muslim customs, or those of Parsis and Buddhists, was any better.

⁷⁴Arnould asserted that the press “was the only tribunal before which backward and evil customs could regularly be exposed to a credulous public.” Dobbin, Urban Leadership in Western India, 70.

⁷⁵Vaccha, Famous Judges, Lawyers and Cases of Bombay, 70. Arnould’s role in the Maharaj Libel case, and many others, gave him the reputation of a very learned, liberal-minded man and conscientious judge.

was a stickler for English law, and ignorant and impatient with the diversity of customs and practices which were the norm in the sub-continent. This was the judge who determined that according to British and Hindu law, Gangbai's petition to inherit a major portion of her father's estate, previously in the hands of her father's widow, was denied. It was also Sausse who firmly declared that Khojas were governed by Hindu law.

Inheritance from Women: *In the goods of Mulbai*, 1866

A few years after the *Gangbai v. Thavar Mulla* case, another Khoja dispute came before the Bombay High Court. It was over the disposition of the property of Mulbai, widow of Hirji Nanji. The case, *In the goods of Mulbai*, was heard in February 1866. The property in question was estimated at not more than Rs. 7,000, and consisted of her *stridhan*, jewels presented to Mulbai on her marriage, and some personal property inherited from her husband. Her brother, Karim Khatav, applied to the court for letters of administration over the goods of his sister who had died intestate and without children. Pardhan Manji, the caveator, was a distant relation of Hirji Nanji and contested Karim Khatav's claim. Manji sued for 1/23rd of Mulbai's property, to be shared with an additional twenty two distant relations of Mulbai's predeceased husband.

Counsel for the applicant, Karim Khatav, was provided by J. S. White, Acting Advocate General, who had earlier unsuccessfully represented Gangbai in *Gangbai v. Thavar Mulla*. Manji, the caveator, was represented by Sir Andrew Scoble. Scoble had a reputation for ability and fairness and later became Advocate General.⁷⁷

The first witness called forward by White on behalf of Karim Khatav was the Khoja community's *Mukhi*, Allurakia Sumar. The *Mukhi* stated that a widow's husband's near relations normally inherit her property. He suggested that if there were no near male relations

⁷⁶It is thus quite ironic that in the 1866 Aga Khan case, Arnould ruled against the 'reform' party and found in favour of the Aga Khan. Arnould's decision did much to strengthen the control and influence of the Aga Khan over the Khoja community, leaving little recourse to dissenters except to splinter off from the main body.

⁷⁷Scoble was born in 1831 and educated in London. In 1856, he was called to the bar from Lincoln's Inn. He was an Advocate General for the Bombay High Court and a member of the Legislative Council, Bombay from 1872-1877. On his retirement from Bombay, Scoble became the Member of Parliament for Hackney and was appointed member of the Judicial Committee of the Privy Council in 1901. Buckland, *Dictionary of Indian Biography*, 378 and Vaccha, *Famous Judges, Lawyers and Cases of Bombay*, 132.

of the widow's husband, then her nearest male relation, in this case a brother, was "entitled" to the property. However, the *Mukhi's* statement was dismissed by the court, as no specific examples were provided, even though it was admitted that "no case precisely similar to the present has been deposed to by any of the witnesses."⁷⁸ The evidence of the *Kamaria* (accountant, assistant to the *Mukhi*) was used to suggest that taking a daughter's or sister's property was considered 'improper,' and conferred a social stigma on any man doing so.⁷⁹ The next three witnesses were determined by the judge to be unreliable.⁸⁰ The last witness, Khanji Hira, stated that he knew of no instance where distant relations of the husband inherited the wife's/widow's property. Incredibly, however, little weight was given to his testimony as his profession and social stature were considered beneath 'weighty' consideration.⁸¹ Notwithstanding that all of these witnesses were from the main body of the Aga Khani Khoja Isma'ili community, and the *Mukhi* and *Kamaria* were head of the Khoja community's own decision making body, none of these witnesses were recognized as either leaders or representative of their community by the court.

The judge admitted that the applicant, Karim Khatav, brother of the deceased, Mulbai, was entitled under Hindu law to inherit any part of the property that was the *stridhan* of the woman. Similarly, he noted that if Khojas followed Muslim law, the applicant would also have been entitled to a portion of the property.⁸² What the caveator, Pardhan Manji, contended was that there existed a peculiar Khoja custom which was neither Hindu nor

⁷⁸*In the goods of Mulbai* (1866) 2 Bombay High Court Reports, 280.

⁷⁹*In the goods of Mulbai* (1866) 2 Bombay High Court Reports, 280-1.

⁸⁰One witness was dismissed as he suggested that Mulbai left a will, the other was dismissed for no specific reason, simply that it was decided that his evidence "could not be depended upon". Similarly the next witness, Dhanji Raju, was dismissed as collusion was suspected between him and the two earlier witnesses. *In the goods of Mulbai* (1866) 2 Bombay High Court Reports, 282. It is likely that this was the same witness, Dhunjeebhoy Ragoo, in *Hirbai v. Gorbai*, who when asked about Couch not believing his evidence in the *In the Goods of Mulbai* case, replied "I don't know whether Sir R. Couch said [that]. I don't understand English." He admitted that he "gave evidence in support of the view taken by Aga Khan's party" in the Mulbai case, yet could no longer recall any of the specifics. Dhunjeebhoy Ragoo, SRO, JD 1880, 31, *H. v. G* Hearing, 34-35. This demonstrated the pervasive influence the majority position had on the Khoja community. Hence the witness recalls that he took the Aga Khan party line, but could not even remember what he testified.

⁸¹"Therefore, so far as the opinion of any man such as this witness was -- a firewood dealer -- can be considered of any value, there is evidence that the husband's family will take the property [sic]." *In the goods of Mulbai* (1866) 2 Bombay High Court Reports, 282.

⁸²This was according to Macnaghten, Chapter One, 21, referred to in *In the goods of Mulbai* (1866) 2 Bombay High Court Reports, 277-8. I was unable to verify the original source, as my version of Macnaghten's book did not have this particular reference, but the argument is supported by general Muslim law.

Muslim.

Manji argued that a specific Khoja custom existed which denied a woman's family any right to her property. Hence, her husband's family would inherit, even if the husband's relations were very distant and the wife's relations were close. If no relations were found on the husband's side, then, it was argued, the woman's property was given to the Khoja community.⁸³ If the *jama'at khana* saw fit to then give part of it to the wife's relations, it was their choice, but the wife's relations had no right to the property. Manji provided no concrete evidence of the custom alleged, nor did any of his witnesses provide anything beyond their belief or opinion that such a 'custom' existed.

On behalf of Manji, Scoble first called as witness Fajalbhai Gulam Husen. Husen was a prominent member of the Khoja reform faction, the successor to the earlier *barbhai* dissidents. It is interesting to note the bias of the court which accepted Husen as a leading member of the Khoja community, and agreed that his evidence was "very strong." Husen acknowledged that he was interested in converting the caveator to the reformist cause, yet the court considered him such a "respectable gentlemen" that it asserted that he would not give unreliable or untrue evidence. His general assertion that "[a]mongst us it is unlawful to take the property of a sister" was immediately contradicted by his mention of an instance where a brother took the property of his sister.⁸⁴ The court, however, chose to accept Husen's general opinion over his own specific instance to the contrary. The last two witnesses for the caveator, Pirbhai Khalakdina and Khan Muhammad, clearly articulated Khoja custom as: the husband's relations inherit, if no male relations were found, the property went to the *jama'at*.

It is obvious that Manji participated in the case with the expectation of limited remuneration, given the costs involved in such cases and that the portion he sued for was only 1/23rd of Rs. 7,000. If he was pushing for recognition of his position for more than monetary gains, it begs the question -- why did he oppose the grant of letters of administration to Mulbai, wife of Hirji Manji -- a man to which he was related in descent from a common ancestor four times removed? It is telling that his primary witness was a known leader of the

⁸³Most of Manji's witnesses generally agreed that this was done so in the name of the Aga Khan, yet at the same time appeared to assume that the *jama'at* would then dispose of the property as they saw fit without consulting the Aga Khan. The way in which the *jama'at* property was discussed in this case was quite interesting, given the impending Aga Khan case.

⁸⁴*In the goods of Mulbai* (1866) 2 Bombay High Court Reports, 282-3.

reform faction, which leaned towards mainstream Sunni Islam, yet in dealing with both this case and the previous 1847 Khoja Female Inheritance cases, had argued in favour of the existence of specific customs in opposition to those found in Muslim law. It is also significant to note that the Khoja community was in the midst of preparations for the Aga Khan case. Only a few months later, in June 1866, the court ruled that all Khoja community property was the personal property of the Aga Khan. This may have played no small role in Manji's motivation in the suit as his primary witness was one of the plaintiffs against the Aga Khan. The challenge to Karim Khatav's right to the property was likely one of principal, not financial gain. Given that Karim Khatav was supported by witnesses from the Aga Khani party, the 'principal' could have also been opposition to any benefit which might accrue from the property to a supporter of the Aga Khan.

By contrast, Karim Khatav was referred to as being in a poor financial position. Clearly, economic gain played a significant role in his motivation. However, as he called upon the *Mukhi* and *Kamaria* of the *jama'at khana*, who were supported by the Aga Khan, it appears that he came from the majority community in opposition to the reform faction. This alliance may or may not have been a factor in his actions, though it would seem to be less so than with respect to Pardhan Manji. The court appeared quite prejudiced against the poorer plaintiff and impressed by the wealthier caveator and his reformist witness. The bias against the economic status of both the plaintiff and, specifically, a witness on his behalf who was referred to in an insulting and dismissive way, indicated a clear predisposition in favour of the caveator.

Sir Richard Couch,⁸⁵ Acting Chief Justice, rendered judgement in the case. While Judge Couch was confused about the specifics of the 1847 Khoja Female Inheritance cases,⁸⁶ he, unlike Sausse, recognized that Perry did not "decide that Khojas are governed

⁸⁵Sir Richard Couch was born in 1817 and educated privately. He was called to the bar from the Middle Temple in 1841 and was appointed to the position of Recorder of Bedford in 1858. He then became Puisne Judge of the Bombay High Court in 1862. In 1866 he was appointed as Chief Justice of Bombay, then was shifted to Calcutta to hold the position of Chief Justice of Bengal from 1870-1875. He was a member of the Judicial Committee of the Privy Council from 1881-1901. Buckland, *Dictionary of Indian Biography*, 97. Among other things, Couch is remembered for admitting Baddrudin Tyabji as the first Indian Advocate of the Bombay High Court. Husain B. Tyabji, *Budruddin Tyabji. A Biography* (Bombay: Thacker & Co., 1952), 25.

⁸⁶For example, Couch stated that the 1847 Khoja Female Inheritance cases were "between the daughter and the brother of a deceased Khoja." *In the goods of Mulbai* (1866) 2 *Bombay High Court Reports*, 277. It has already been established in the previous chapter that the conflict was between the widows and daughters of

by Hindu law.”⁸⁷ Couch, instead, noted the specificity of Perry’s judgement. Equally, he made the distinction that the Khojas were not, “properly speaking,” governed by Hindu law. Yet at the same time, Couch accepted the application of Hindu law “modified by their own peculiar customs.”⁸⁸ One such alleged Khoja custom he felt justified in upholding was the exclusion of a woman’s relations from inheriting her property in the *Mulbai* case.

It appears that in determining Khoja custom, only a few witnesses for each side were considered -- hardly sufficient testimony to either establish or disprove a custom. It also appears that far from establishing “beyond a doubt” the existence of a particular Khoja custom, the case was won on the court’s decision to ignore the supporting evidence of the applicant’s witnesses, and the absence of counsel’s formulation of a convincing argument in favour of the applicant’s rights under either Hindu or Muslim law.

What is intriguing about the case is not just what was decided, but that the witnesses all assumed that the outcome could have been quite different if *Mulbai* had left a will. It was not questioned that a Khoja woman had the power to make a will, nor were any limitations assumed on her power to dispose, by will, both her *stridhan* and property inherited from her husband. A brief reference to what occurred when a woman, in a dissimilar situation, left all her property by will to her brother is highly revealing. While it was clarified that the incident in question was a sister who lived with her brother, it was evident that a woman could control property and the validity of her will was not questioned.⁸⁹ Hence it cannot be presumed that

Haji and Sajun Mir Ali and no brother played a role.

⁸⁷Couch stated: “The customs of the Khojas are certainly at variance with Muhammadan law. They are, probably, at variance also, in many respects, with Hindu law. But they are much more analogous to Hindu law than to Muhammadan law. In fact, they would appear to be a caste who, in their conversion from Hinduism, preserved to a great extent their old law as to property, while they confirmed in religious matters to the law of the Kuran.” *In the goods of Mulbai* (1866) 2 Bombay High Court Reports, 278.

⁸⁸*In the goods of Mulbai* (1866) 2 Bombay High Court Reports, 284. A later case, when referring to Couch’s position with regards to the application of Hindu law to the Khoja community, noted that although “some remarks of the Chief Justice [Couch] would *almost imply*” such a conclusion, “they *can scarcely be relied on as an express authority to that effect*.” [Emphasis added] Judge Sargent also made the distinction between the universal application of Hindu law and the specifics of a particular circumstance. Sargent recognized that the dispute in *In the goods of Mulbai* should be “treated as one between persons claiming under two rival customs.” *Hirbai v Gorbai* (1875) 12 Bombay High Court Reports 308.

⁸⁹While I wish to avoid undue speculation, it would have been very interesting to know more details about the sister / brother case mentioned. It is not explained if the sister lived with the brother because she was separated, divorced, or not yet married, or, as importantly, how she acquired her property. What is remarkable is that the woman had both property and the wherewithall to write up a will in which she bequeathed her property to her sibling. It should also be recalled that there had been an earlier application for letters of administration

property must automatically revert to the husband's heirs -- only in the absence of a will (intestate succession) was this true or accepted.

Women vs. Women: *Hirbai v. Gorbai*, 1875

The next significant Khoja case involving female inheritance was an application for letters of administration of the estate of Rahimbhai Allubhai.⁹⁰ The case, *Hirbai v. Gorbai*, became quite controversial, led to additional disputes before the High Court, and was often referred to in later attempts at creating a specific Bill of law to govern Khoja succession and inheritance. Rahimbhai Allubhai, a Khoja merchant, died intestate December 20, 1870, leaving no children, brother or father. Litigation was between his widow, Hirbai, his mother, Gorbai, and his widowed sister, Rahimatbai.⁹¹ Also party to the suit were two male cousins who claimed the right to inherit the property.

Sir Charles Sargent⁹² heard the *Hirbai v. Gorbai* case in several sittings from December 15, 1873 to June 22, 1874, and rendered judgement on July 2, 1875. Hirbai, the applicant, was represented by Ferguson and John Macpherson.⁹³ Hirbai's mother-in-law, Gorbai, was represented by the Advocate General Scoble and Pigot.⁹⁴ It should be noted that

before the Registrar, in which a sister took her brother's property. Noted above, Chapter Four, 96-7.

⁹⁰Rahimbhoy Allubhoy was later more commonly spelt as Rahimbhai Allubhai. The spelling most frequently used in *Hirbai v. Gorbai* is the one used here.

⁹¹The first application for administration of the estate was made by Hirbai, as widow of the deceased, on June 30, 1871. The next application was made by Gorbai on July 17, 1871. On August 1871, Gorbai and Rahimatbai filed caveats against the application made by Hirbai. Gorbai's affidavit provided the grounds of her claim as mother of the deceased. *Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 295. Rahimatbai was referred to as married by the judge, however, in witness testimony it was noted that she was widowed and this was why she was living with her mother. Testimony of Hassumbhoy Goolam Hoosein in SRO, JD 1880, 31, *H v. G* Hearing, 42.

⁹²Charles Sargent was born in 1821 and was educated at King's College, London and Trinity College, Cambridge. He was called to the Bar at Lincoln's Inn in 1848. He was first Chief Justice of the Ionian Islands, then in India was puisne Judge for 16 years before he became Chief Justice in 1882. He was known for his short, lucid and concise judgements, and for being at times impatient. He was considered remarkably free from racial prejudice, and encouraged promising Indian advocates like Tyabji and Telang. On Sargent's retirement in 1895, Pherozeshah Mehta gave the following tribute to his character and reputation: "In the illustrious role of judges distinguished for culture, capacity and learning, none has so worthily sustained the great traditions of British justice as Sir C. Sargent." Vaccha, Famous Judges, Lawyers and Cases of Bombay, 72-3. Buckland, Dictionary of Indian Biography, 374; Waccha, Shells from the Sands of Bombay, 720.

⁹³Perhaps telling, Macpherson had a reputation for being exceedingly good counsel in a strong case, but a bad one for a weak case -- "being so transparently honest that he could scarcely conceal from the court his own opinion of the poor merits of his case." Vaccha, Famous Judges, Lawyers and Cases of Bombay, 133.

⁹⁴The case does not indicate which Pigot represented Gorbai with Scoble, though it was likely the elder brother. He was a Chancery lawyer before coming to India later in life. He was also well-versed in equity and

Scoble had earlier successfully represented Pardhan Manji in *In the Goods of Mulbai*. Hirbai's sister-in-law, Rahimatbai, had Latham and John Duncan Inverarity for counsel.⁹⁵ C. J. Mayhew and Budruddin Tyabji⁹⁶ represented Fazulbhai Kasambhai and Gulam Husen Jafferbhai, distant cousins of her husband.⁹⁷ The case was heard in the Bombay High Court, Ecclesiastical Side.

At the time of the case, Gorbai was in complete possession of the property and in her late 50s / early 60s.⁹⁸ She was not an educated woman and could neither read nor write. However, she conducted a business selling "antimony for the eyes" and had done so for "a great many years."⁹⁹ Although one witness thought such an occupation was "not proper for a lady like Gorebai,"¹⁰⁰ she evidently earned a position of considerable respect and standing in the community, perhaps partially through such work. Importantly, Gorbai was supported by the Aga Khan and his party.¹⁰¹

his written opinions were valued, and often sought after for important consultations. However, his oral skills were weak - so inaudible that he was difficult to comprehend. The younger Pigot was considered unconventional -- both in law and politics. He was suspected of having sympathy for the Fenian movement, and was boycotted by some colleagues for his free-thinking. Influence in England helped him obtain the position of judge on the High Court at Calcutta. Waccha, *Shells from the Sands of Bombay*, 732-4.

⁹⁵Inverarity, then in the early stage of his career, went on to practise law in Bombay for a remarkable 53 years (1870-1923). This was an exceptionally long record. Born in Bombay in 1847, he became a barrister in 1869. He developed the reputation of being a highly skilled, resourceful, talented, courageous, barrister with an active and comprehensive mind. He was also known as a fair man, remarkably free from racial or political prejudice. Curiously, he never made notes, nor underlined his briefs, as was the general practise. Vaccha, *Famous Judges, Lawyers and Cases of Bombay*, 139-145.

⁹⁶Badruddin Tyabji, a Bohra Muslim, was one of the most prominent Indian barristers, then judge, in Bombay. Numerous works have been written on his life and judicial career. See: Husain B. Tyabji, *Badruddin Tyabji. A Biography* (Bombay: Thacker & Co., 1952). Government publication on Tyabji include: Laeeq Futehally, *Badruddin Tyabji* National Biography Series (New Delhi: National Book Trust, 1994) and A. G. Noorani, *Badruddin Tyabji* Builders of Modern India Series (New Delhi: Ministry of Information and Broadcasting, Government of India, 1969).

⁹⁷These men were referred to as both cousins and distant male relations of the deceased. They were Sunni Khojas. Testimony of Alladin Premjee in SRO, JD 1880, 31, *H v. G* Hearing, 18.

⁹⁸Testimony of Soojeebhoy Manockbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 5; Jairaz Peerbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 28.

⁹⁹Testimony of Jairaz Peerbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 28. Other witnesses confirmed this. For example "she is much consulted for remedies for bad eyes." Testimony of Jairaz Peerbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 27. Her lack of formal education or literacy was entirely consistent with her age. The majority of Khoja men her age were similarly illiterate.

¹⁰⁰Testimony of Jairaz Peerbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 28.

¹⁰¹The party supporting the Aga Khan was described as being "anxious that the decision should be in favour of Gorbai." He also noted that: "There is a strong feeling in the Kojah caste on this case. I believe a few members of the Jamat are making exertions for Gorebai. They have considerable influence with our community." Testimony of Jairaz Peerbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 28, 24. The *Kamaria* refuted this stating that "No corrupt influence or intimidation has been used that I know of to obtain evidence

Hirbai was considered educated and could read and write Gujarati.¹⁰² Several witnesses considered her the more capable and intelligent of the two women. Three months after the death of her husband she moved in with her father's brother's son.¹⁰³ She had fallen ill in the home shared with her mother-in-law and sister-in-law. Hirbai "was not properly cared for" there and left the house on the advice of a doctor, called in by her relations, and with Gorbai's consent. She left with only "10 bangles which she had on her hands and the suit of clothes she had on her back."¹⁰⁴ After this incident of neglect, Hirbai had considerable support from her extended family and several members of the Khoja community from both Shi'a and Sunni factions.¹⁰⁵ An additional factor in her decision to contest her mother-in-law's right to the property may have been her own family history. Hirbai's mother had faced a similar predicament thirty years previously where the mother-in-law took the property. The circumstances Hirbai's mother faced were such that she soon remarried.¹⁰⁶

The *Hirbai v. Gorbai* case was concerned with establishing rules of succession amongst Khojas, the role of custom in inheritance and succession, and which female relation had the right to inherit the estate and under what conditions. The judge reviewed all reported Khoja cases and several which were earlier resolved by the Registrar.¹⁰⁷ Based on these cases, he concluded that for the last twenty five years, at least, the Khoja community has been regarded by the court to be governed by Hindu laws of inheritance, with only limited modifications.¹⁰⁸ He also heard extensive testimony from witnesses, considerably more than

in favour of Gorbai." Testimony of Khakee Puddumsey in SRO, JD 1880, 31, *H v. G* Hearing, 50.

¹⁰²As noted above, Gorbai's lack of education was entirely normal. Hirbai's literacy, however, was exceptional but not unheard of as other daughters of wealthier men received limited education.

¹⁰³The relation, Soojeebhoy Manockbhoy, was son of a prominent Khoja who had been *Kamaria* not only in Bombay for a year, but also at Kutch and Zanzibar. He considered himself to be Shi'a and "one of the leading men of the community." Testimony of Soojeebhoy Manockbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 1.

¹⁰⁴Testimony of Soojeebhoy Manockbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 2.

¹⁰⁵For example, her maternal uncle introduced her to her solicitors, Messrs. Macfarlane and Skipsey. She applied for administration of the estate "of her own free-will." Testimony of Soojeebhoy Manockbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 2.

¹⁰⁶Hirbai's mother's first husband, Naroo, died. Her mother-in-law, Labai inherited the property of her son, worth around Rs. 3-5,000. The witness did not know if Hirbai's mother was maintained by her own family or her husband. However, she remarried and Hirbai was a daughter of this second marriage. Testimony of Embram Ooka, Hirbai's mother's sister's husband, also Gorbai's mother's sister's son, in SRO, JD 1880, 31, *H v. G* Hearing, 61.

¹⁰⁷*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 300-305. Details of these previous cases have been noted above.

even the 1847 Khoja Female Inheritance cases.¹⁰⁹

The court recognized that Khojas were originally Hindu and converted by a Missionary of an Isma'ili Imam to Aga Khani Isma'ili Shi'a Islam. Judge Sargent wrote that he had "no hesitation" in applying Hindu law to the Khoja community in matters outlined in Perry's decision, Sausse's judgement and generally supported by other cases before the court.¹¹⁰ However, he also acknowledged that the Khoja community's legal position was partly regulated by Muslim law, partly by Hindu law, and partly by custom. It was also accepted that the Khojas

occupy a position so peculiar that the Courts do not apply to them, when seeking to prove a custom of inheritance or succession, differing from the Hindu law, the stringent rule that the custom must be proved to be ancient, invariable, and submitted to as legally binding, but will act upon satisfactory evidence that it has been the general custom and accepted as such by the great majority of the Khoja community.¹¹¹

Hence, less rigor was required to determine a Khoja custom than for other Muslim communities.

As Hirbai, the widow, alleged a Khoja custom which was opposed to Hindu law, the onus of proving the existence of a different practise rested on her. She, therefore, had to prove that when there were no children and her husband died intestate, the widow inherited the estate and was responsible only for the maintenance of her mother-in-law.

Challenging this was Gorbai's claim that according to Khoja custom, the mother inherited the property and was obligated to maintain the wife only if she were chaste and did not remarry.¹¹² Gorbai argued that according to Khoja custom, she, as mother of the deceased, became the head of the family -- with all the rights and responsibilities that position entailed. Rahimatbai filed an affidavit on August 8, 1871 supporting her mother's right to inherit, as head of the family.¹¹³

¹⁰⁸*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 305.

¹⁰⁹There were 13 witnesses called for Hirbai, 15 for Gorbai, and 5 for the cousin, Fazulbhai Kasambhai, for a total of 32 witnesses. By contrast, the 1847 case heard testimony only from 9 witnesses, some of whom merely corroborated other witness' testimony.

¹¹⁰*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 299.

¹¹¹*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 294.

¹¹²It was common for Khoja widows to remarry, with no social stigma attached. As will be noted in chapter five, insufficient maintenance may have been a factor in many Khoja women's decision to remarry.

The witness testimony, for both sides, reflected a number of biases and similarities. Sargent noted, on more than one occasion, that the evidence was often contradictory. It is important to mark the different allegiances of witnesses for the two women. Gorbai's witnesses all came from the party which supported the Aga Khan. Hirbai's witnesses were far more diverse, including Sunni Khoja reformers, Shi'a Khojas in conflict with the Aga Khan, and supporters of the Aga Khan. Her witnesses also came from a variety of backgrounds and locations, from Zanzibar, to China to Salsette. While several of Hirbai's witnesses were related to her, so too did many of Gorbai's witnesses have familial or other ties.¹¹⁴ For example, more than one witness rented property from her.¹¹⁵

One point of contention between the two sides was the issue of intelligence and competence. Several witnesses argued that intelligence should be the measure used to decide who should manage the property. Although a mother is "respected as an elder lady.... as the head of the female branch of the family," it was contended that "the sharpest" woman managed property.¹¹⁶ If a mother no longer "retains her wits" then the daughter-in-law no longer had to listen to and obey her mother-in-law.¹¹⁷ It was also alluded to several times that Gorbai was no longer as competent as she once was, whether through old age, grief about the death of her son Rahimbhai Allubhai, or earlier problems with her other son, also deceased.¹¹⁸ One witness for Hirbai openly cast aspersions on Gorbai's ability to manage the

¹¹³ *Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 290.

¹¹⁴ Hirbai's sister's husband, Dhurumsey Kakoo, spoke on her behalf. He was a Shi'a merchant who conducted business for many years in China. He came from a prominent Kutch family and was active in *jama'at* affairs in both Kutch and Bhooj. He recognized the Aga Khan as the spiritual head of the Khoja community. Dhurumsey Kakoo, SRO, JD 1880, 31, *H v. G Hearing*, 8 and 10. Hirbai's mother's sister's husband, Ebrahim Dama testified on her behalf. So too did his brother, Meer Alli Dama, a Sunni Khoja merchant. Meer Alli Dama and Ebrahim Dama, SRO, JD 1880, 31, *H v. G Hearing*, 21 and 20. It should also be noted that several of her witnesses were not relations, and included those who supported the Aga Khan as well as both Shia and Sunni factions which opposed the Aga Khan.

¹¹⁵ Many of the witnesses on Gorbai's behalf had some kind of direct connection with her. For example, Dhunjeebhoy Ragoo rented his shop from Gorbai. Testimony of Dhunjeebhoy Ragoo in SRO, JD 1880, 31, *H v. G Hearing*, 34. The *Kamaria* of the Aga Khani Khoja community visited with Gorbai often. His uncle was a tenant in Gorbai's house and for a short while, he also lived in her house. Testimony of Khakee Puddumsey in SRO, JD 1880, 31, *H v. G Hearing*, 50. It is also significant that not a single witness for Gorbai was from either the Sunni reform party or one of the excommunicated Shi'as. All were supporters of the Aga Khan, if not actively so.

¹¹⁶ Testimony of Rahimbhoy Hemraj in SRO, JD 1880, 31, *H v. G Hearing*, 14.

¹¹⁷ Testimony of Rahimbhoy Hemraj in SRO, JD 1880, 31, *H v. G Hearing*, 14.

¹¹⁸ The other son was convicted of an unspecified crime, all his property was confiscated and he died in 1854. Eventually this property was turned over to Rahimbhoy Allubhoy and Gorbai by the crown. SRO, JD

property. He stated that: "I don't think she is fit to manage the property herself."¹¹⁹ By contrast, he asserted that "Hirbai is an intelligent person" and that the reason so many opposed her claim was due to an earlier incident against Hirbai's family by the Aga Khan's son.¹²⁰ In Gorbai's defence, many of her witnesses referred to her intelligence and ability as a business woman. Any suggestion of incapacity was refuted by her supporters.¹²¹ However, given that Gorbai passed away a few months after the decision was made by Judge Sargent, the concerns regarding her health and capacity may have been valid.¹²²

It is also significant that there were more distant male relations involved in the case. Both Fazulbhai Kassambhai and Gulam Husen Jaffarbai brought forward claims to the estate as cousins of the deceased. Their contention was that the female members of a family were only entitled to maintenance. They argued that they, not any of the women, were entitled to the property, subject only to the maintenance of unmarried female family members. They argued that the custom they alleged was a "more reasonable one" than that proposed by the women. However, as they were unable to provide any concrete cases where a male relation further removed than a brother or father inherited the estate, the judge ruled that their claim could not be substantiated and hence was invalid.¹²³ Regarding this specific matter, Sargent 1880, 31, *H v. G* Hearing, 1.

¹¹⁹Testimony of Jairaz Peerbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 24. Other witnesses cast doubts on Gorbai's ability to manage the property. Another witness for Hirbai openly stated that "Gorebai is an old woman, Heerbai young. I should say she [Hirbai] was fit to manage the property." Testimony of Ebrahim Dama, SRO, JD 1880, 31, *H v. G* Hearing, 23.

¹²⁰The details were not clarified but it was evident that there were 'hostile feelings' over the Aga Khan's son trying to urge community members to boycott the funeral of one of Hirbai's relatives. In the end, the *Mukhi* and *Kamaria* tried to persuade people to attend in order to show that the rumour was false. Testimony of Jairaz Peerbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 24.

¹²¹Witnesses for Gorbai refuted such allegations and said that she was a capable "woman of business." Testimony of Hassumbhoy Goolam Hoosein in SRO, JD 1880, 31, *H v. G* Hearing, 42. Similarly the *Kamaria* of the Aga Khani Khoja community asserted that Gorbai was "a person of good intelligence, and can attend to business matters." Testimony of Khakee Puddumsey in SRO, JD 1880, 31, *H v. G* Hearing, 50.

¹²²Gorbai passed away on October 4, 1875. *Rahimatbai v. Hirbai* (1877) 3 Indian Law Reports, Bombay Series 34.

¹²³Tyabji apparently argued quite vigorously on this point. He found a few cases where a more distant male relation inherited, but as they took place in Jafferbad and Ragoola, were not considered relevant to the Bombay court. He further pointed out that the instances in which a more distant male relation inherited would, necessarily, be "very few and far between", hence should not be held against his clients. The judge remained unconvinced in light of the many cases in which a woman managed an estate in the absence of a near male relation. He also noted that the only cases where men managed property under these circumstances was when the male relation lived jointly on the income of the ancestral property, was engaged in trade with the deceased, or with the consent of the mother or widow. *Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 305-307.

ruled that when

looking at the vast preponderating evidence in favour of the right of the widow and mother to the management... of the property, as against any but very near relations, and those, too, under exceptional circumstances, ... it would be impossible, I think, to hold that the custom [of a more distant relation inheriting] has been proved.¹²⁴

This conclusion was based, in part, on testimony provided by witnesses, like the *Kamaria*, who placed no limit on a mother's right to dispose of any property inherited from her son. It was suggested that the mother actually owned the estate, however she was responsible for maintaining the widow or unmarried females in the family, and consequently had to manage the property accordingly.¹²⁵ The *Kamaria* went so far as to argue that a mother inherited divided or separate property in preference to a brother. In such a situation, a brother had no right to interest or management of the property. The only limitation was if the mother remarried, she could not take the property to her new husband, instead, it reverted to the nearest male relation of the son.¹²⁶ The assertion that a mother inherited absolutely from her son was repeated over and over by witnesses for Gorbai. By contrast, most witnesses felt that a widow could not dispose of the property or sell it.¹²⁷ The *Kamaria* believed that a widow had no ownership of the property, even if she managed it. A widow could inherit absolutely only if there were no relations of the deceased husband within three generations.¹²⁸

While Sargent found many witnesses' testimony to be contradictory, he felt that he had obtained more than sufficient evidence to prove that both a mother and a widow had the right to manage the property during their lives.¹²⁹ Sargent's support for, and certainty regarding, a Khoja woman's right to manage property was likely a reflection of the care he had taken to

¹²⁴*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 311.

¹²⁵The *Mukhi*, Allarukhia Soomar, stated that: "The mother becomes the absolute owner of the property and can leave it to whom she pleases. It is an old custom." SRO, JD 1880, 31, *H v. G* Hearing, 43. Nearly all witnesses for Gorbai contended that a mother could do what she wished with the estate, so long as she provided adequate maintenance for the widow, sister or any other relations dependent on it.

¹²⁶*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 312-3.

¹²⁷*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 312. This was reflected by the testimony of other witnesses for Gorbai who asserted that "The mother has full power over the property to do as she pleases with it, but is bound to give the widow maintenance out of it." Testimony of Dunjeebhoy Ragoo in *H v. G*, SRO, JD 1880, vol. 31, Hearing, 31.

¹²⁸Testimony of Peeroo Mahomed in SRO, JD 1880, 31, *H v. G* Hearing, 63.

¹²⁹*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 307-8.

ascertain the views of the community from witnesses. He did not consider questions regarding intelligence or capacity of the women pertinent to his decision. Nor did he feel that the conflicts within the Khoja community had any bearing on the case. Instead, he sought to determine only if an additional Khoja custom gave preference to a mother in a dispute between a mother and widow over the right to manage the property of their son/husband.

Sargent's judgement held that such a custom existed, so Gorbai was entitled to management of Rahimbhai Allubhai's estate, in preference to his widow or sister.¹³⁰ This decision seemed to be made largely in recognition of the mother as head of the female branch of a family. Although it was determined that a special Khoja usage existed in opposition to Hindu law, the application of Hindu law to the Khoja community generally was upheld. Significantly, the case report directly stated that succession to the property of a male Khoja was the same as succession to the property of a male Hindu, with the single exception that recognized a mother's priority over a widow. Such language re-enforced the application of Hindu law to the Khoja community, even when the decision recognized a custom at variance with Hindu law.

Rahimatbai v. Hirbai, 1877

Less than two years later, another dispute over control and management of Rahimbhai Allubhai's¹³¹ estate erupted in *Rahimatbai v. Hirbai*, this time between the widow and sister. Rahimatbai was the appellant in this case and argued that she was entitled to succeed to her brother's estate in preference to his widow and in accordance with her mother's will. Rahimatbai's mother, Gorbai, had been granted letters of administration to Rahimbhai Allubhai's estate in the 1875 *Hirbai v. Gorbai* judgement. Gorbai died October 4, 1875, leaving a will, dated April 3, 1875, in which she bequeathed all moveable and immovable property that she possessed or was entitled to at the time of her death to her daughter, Rahimatbai, her daughter's heirs and so forth.¹³² The only limitation Gorbai noted was a

¹³⁰Witnesses such as Jairaz Pirbhai unequivocally stated that: "The mother has the better right to manage the property, giving the widow and sister maintenance. If a brother were left, he would manage, but not distant relations.. There is no established custom where the property goes after the mother...If [the] sister or widow survive the mother, I do not think distant relations can take. I say this as far as I know, only very near relations take when the parties are separate. I say that only a brother or father would take in that case." *Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 309-10.

¹³¹In *Rahimatbai v. Hirbai*, the deceased's name was more frequently spelt as Rahimbhai Allubhai, not Rahimbhoy Allubhoy, thus this is the spelling used in discussion of the the case.

responsibility to maintain her daughter-in-law, Hirbai. In response, Hirbai argued that as widow of Rahimbhai Allubhai, she was entitled to succeed her husband's estate in preference to his sister.

Chief Justice Sir Michael Westropp and J. P. Green¹³³ heard the case and rendered judgement on September 1, 1877. The plaintiff, Hirbai, was represented by the Advocate General, John Marriott, Purcell and Basil Lang. Rahimatbai again engaged Inverarity, this time with Pigot, who had helped represent her mother in the previous dispute. The main issue in the case was again the particular position of Khojas with regards to inheritance and custom. It examined the evidence and the issue of 'burden of proof' for a custom contrary to what had been established in previous Khoja cases and under Hindu law.

It is significant to note that unlike in *Hirbai v. Gorbai*, Judges Westropp and Green had no qualms about directly addressing the issue of placing the Khoja community under Hindu law. No explanation or justification was provided, both simply appeared to feel it appropriate to rule that the Khoja community were definitively governed by Hindu law in matters of succession and inheritance. Not only did Westropp and Green believe this, they went so far as to place themselves in the role of ensuring the strict application of Hindu law to the Khojas in all matters of succession and inheritance. The only exception granted was that of a mother succeeding in preference to a widow, as recognized by the court in *Hirbai v. Gorbai*. This was accomplished by requiring more evidence than merely the opinion of leading members of the Khoja sect. Instances had to be proved in which the alleged custom was observed and followed. So, in contrast with Couch's acceptance in *In the goods of Mulbai* that a general opinion, held by not even half a dozen witnesses, was sufficient proof of a custom, Westropp and Green demanded more concrete confirmation of a custom. Such rigor was, in some ways, inherently problematic as the community in Bombay was not large enough to have many examples of similar circumstances. One example provided from outside of Bombay was dismissed as unsatisfactory.¹³⁴

¹³²While Gorbai was in possession of Rahimbhai Allubhai's estate at the time she wrote her will, the *Hirbai v. Gorbai* case had not yet been decided.

¹³³Green was known to be racially prejudiced. He had also been quite partial towards the executive, not the judiciary side, and his judgements were said to reflect both prejudices. Waccha, Shells from the Sands of Bombay, 737-8.

¹³⁴For example, the court dismissed the evidence provided by Hassanbhai Gulam Husen of an instance

The evidence gathered by and large supported the earlier decision to place management of the property in the hands of the mother, in preference to the widow. The testimony was less conclusive, however, when responding to the mother's right to alienate the property and to dispose of it by will. While it was generally suggested as being possible, no instance was cited in which a Khoja mother actually alienated property.¹³⁵ Based on this, the court concluded that a Khoja woman could not dispose, by will, of inherited property, even if she had letters of administration to the estate. Instead, a Khoja woman inherited property with a life interest only, not absolutely. This meant a woman could manage property but not alienate it during her life. Instead, she had to keep the estate intact for the male heirs to whom it would revert on her death. She, and those dependent on the estate, were entitled only to reasonable and appropriate maintenance, nothing more. The result of this limitation on a woman's right of inheritance was that Rahimatbai's plea was turned down. Rahimatbai could not gain letters of administration to the estate as it was not actually her mother's absolute estate, instead merely in her mother's keeping for her life time only.

The court also ruled against Rahimatbai's allegation that there was a special usage prevailing among the Khojas which entitled a sister to succeed in preference to a widow.¹³⁶ Hence, in this case, on the death of the mother, the widow was granted administration of the property, according to Hindu law. However, if Hirbai was truly bound by Hindu law, she would also have only a life interest in the estate. As will be seen in the subsequent litigation, this was not so. Instead, Hirbai understood that she had finally inherited the property in

where a mother disposed, by will, of property inherited from her son. Although it is possible that the evidence was deemed unsatisfactory due to the unconvincing manner of the witness, it is more likely because the example took place in Zanzibar.

¹³⁵By contrast, widows had, on more than one occasion, carried on the family business and risked alienating portions of the estate through their activities.

¹³⁶This appears to be overwhelmingly supported by testimony in the previous *Hirbai v. Gorbai* case. Several witnesses asserted that even when both Hirbai and Gorbai died, "Rahimutbai would not inherit." Dhurumsey Kakoo, SRO, JD 1880, 31, *H v. G* Hearing, 9. Only two witnesses spoke in her favour suggesting that: "After the death of the mother the property is to be managed by the widow but the owner is the sister. If she wishes to manage the property she can. ... It is usual and proper for the sister to let the widow manage it if she has been faithful to the memory of her husband. But she can if she chooses take the property herself and allow the widow maintenance." Testimony of Lalljee Ludha in SRO, JD 1880, 31, *H v. G* Hearing, 56. The second witness also indicated that widow manages the property, though "If the widow wastes it she [the sister] can come to the Jamat and prevent her." Rahimbhoy Lalljee in SRO, JD 1880, 31, *H v. G* Hearing, 62. These suggestions were refuted by later witnesses who stated that a sister could not take management of the property away from the widow. Testimony of Carmally Soorjee in SRO, JD 1880, 31, *H v. G* Hearing, 65.

question and could legitimately dispose of it, according to her preference, by will.

Mawjibhai Herjee v. Muljibhoy Rahimbhai, 1902

Even after two previous cases, the estate of Rahimbhai Allubhai yet again came under dispute. The case, *Mawjibhai Herjee v. Muljibhoy Rahimbhai* was decided February 23, 1902 by Judge N. G. Chandavarkar, a known social reformer.¹³⁷ The plaintiff, Mawjibhai Herjee, was represented by Advocate General Basil Scott,¹³⁸ Dinshaw Davar¹³⁹ and E. B. Raikes.¹⁴⁰ G. R. Lowndes¹⁴¹ and Inverarity provided counsel for the defendant, Muljibhai Rahim.¹⁴²

When Hirbai died,¹⁴³ she left a will appointing her mother, Valubai as the executrix of

¹³⁷Sir Narayan G. Chandavarkar was educated at Elphinstone College and was reputed to hold very liberal ideas. He began his career in journalism as editor of the English columns of *Indu Prakash*. In 1881 he took the L.L. B. degree, first class and was enrolled as a pleader in the High Court. He continued his public activities, representing the Bombay Presidency before the English Parliament in 1885. He was equally involved in social reform, particularly interested in eliminating caste prejudices. He was also made fellow of Bombay University in 1886 and was appointed Justice of the Peace in 1889. In January 1901 he was appointed acting Judge at the High Court while Justice Ranade went on furlough for six months. When Ranade died soon thereafter, Chandavarkar was confirmed as Judge of the Bombay High Court. Brojendra Mitter, *Indian Judges. Biographical & Critical Sketches with Portraits* (Madras: G. A. Natesan & Co., 1932) 339-44.

¹³⁸Basil Scott was the nephew of Advocate General Basil Lang. He was educated at Balliol College, Oxford and began practising law in the Bombay High Court in 1884. He became permanent Advocate General on retirement of his uncle in 1903. He also acted as puisne judge in 1906 and was appointed Chief Justice in 1908, on retirement of Sir Lawrence Jenkins. He was known to be handsome, austere, dignified, earnest, fair, of weighty learning and ability, yet also frigid and somewhat distant. He held the "prevailing prejudices of the Anglo-Indians of his time, [yet] he was not narrow in his outlook" and on more than one occasion ruled in controversial cases involving Indian nationalists in a manner considered both fair and dispassionate. Vaccha, *Famous Judges, Lawyers and Cases of Bombay*, 89-90.

¹³⁹Sir Dinshaw Davar (he was still Mr. Davar at the time of the *Mawjibhai v. Muljibhoy* case), was called to the Bar from the Middle Temple in 1880. He started his practise in the police courts and the Court of Small Causes. He also made frequent appearances in criminal matters before the High Court. Particularly knowledgeable in business matters, he was considered one of the ablest and most powerful cross-examiners of his time. On the death of Badruddin Tyabji in 1906, he was appointed to the Bench and sat on the Original Side. As a judge he was outspoken to the extent that his personal opinions interfered with 'the strict judicial detachment expected of a judge.' Vaccha, *Famous Judges, Lawyers and Cases of Bombay*, 90-1.

¹⁴⁰Earnest Berkely Raikes was initially better known as a cricketer than barrister, but acquired a large legal practise, particularly in appeals to the Original Side of the Bombay High Court. He was also known for being "peevisish" with an "irritable temper." He retired from Bombay in 1913 but continued to practise before the Privy Council in Indian appeals. Vaccha, *Famous Judges, Lawyers and Cases of Bombay*, 146.

¹⁴¹George Rivers Lowndes practised law in Bombay for 25 years and was involved in such high profile cases as the Parsi Panchayat Case, where he led for the plaintiffs. Vaccha, *Famous Judges, Lawyers and Cases of Bombay*, 144.

¹⁴²*Mawjibhai v. Muljibhoy* (1902) 4 *Bombay Law Reporter* 199-200.

¹⁴³No date was provided in the report of the case.

her property.¹⁴⁴ She made provisions for certain public charities and suggested that her mother execute a Trust deed to manage the property. Valubai died in 1895, leaving a will which appointed her step-daughter, Kesserbai, and three other persons as executrix and executors of her will and codicil. Valubai had not, prior to her death, made arrangements for executing the Trust suggested in Hirbai's will. Valubai's step-daughter, Kesserbai, made the trust deed in pursuance with Hirbai's requests. Kesserbai appointed herself, Muljibhai Rahim and Gangji Poonja as trustees. On September 28, 1897 Kesserbai died, leaving a will which nominated the trustees, Muljibhai Rahim and Gangji Poonja, and Cassumbhai Nanji as executors of her will.¹⁴⁵ Her will also provided for certain legacies and annual outlays from the residue of her estate which were to be added to that of Hirbai's, under the same Trust deed.¹⁴⁶

The dispute was over whether the legacies and annual outlays provided for in both Hirbai's will and Kesserbai's will were being followed. Part of Kesserbai's will provided for an annual feast in honour of her husband, yet the administration and specific outlays were left at the discretion of the trustees. It was alleged by the plaintiffs, Mawjibhai Herjee and others, that the trustees were misappropriating funds from Kesserbai's estate and were not complying with Kesserbai's will. The plaintiffs were members of Kesserbai's family and stated that they wished to ensure that the executors were appropriately managing the Trust. It is remarkable that these men never attempted to argue that they, not the trustees, had the priority right to control the estate. They were evidently displeased about the way in which it was being administered, but did not appear to have formulated a convincing argument before the court. One wonders if they were fully apprised of their potential rights to the property, or simply assumed that the women had the right to both inherit and dispose of the estate by will.

¹⁴⁴None of the ages of the participants were given, but it is remarkable that Hirbai appointed her mother as executrix. Hirbai's husband died in 1870 and nowhere in the earlier cases did it refer to her as being a minor either at the time of her husband's death or at the time of the 1875 case. As this was standard in most court reporting, it is likely that Hirbai was at least 16 in 1870. As women often married and had children young, Hirbai's mother, Valubai, could have given birth to her daughter in her teens (ie., around 1840). This would make Valubai at least 65 prior to her death in 1895, though it was just as likely that she was older.

¹⁴⁵One of Kesserbai's executors, Cassumbhai Nanji, died May 2, 1890 leaving a will which nominated Rahimtulla Ganji, son of a Gangji Poonja as executor. The passing of trusteeship to Gangji Poonja was not disputed. It is interesting to note that Cassumbhai Nanji was apparently involved in an aborted attempt to have an affidavit drawn up regarding the property before Rahimbhoy Allubhoy's death. Hirbai, apparently, refused to sign it. Testimony of Soojeebhoy Manockbhoy in SRO, JD 1880, 31, *H v. G* Hearing, 2.

¹⁴⁶*Mawjibhai v. Muljibhoy* (1902) 4 Bombay Law Reporter 199-200.

Justice Chandarvarkar found in favour of the defendant, Muljibhai Rahim, who contended that as the appointed trustees in both Valubai and Kesserbhai's wills, they had the right to manage the Trust as they saw fit. The court charged that as long as the discretion was honestly and properly exercised, the executors had the right to continue to administer the trust. Although allegations were made by the plaintiffs to the contrary, none were proven nor recognized by the court as being valid.¹⁴⁷ Hence, in its decision in favour of the trustees, the court upheld the validity of both the trust and the wills of Hirbai, Valubai and Kesserbai. There were no limitations placed on Hirbai's right to dispose of the entire estate, nor did any of her more distant relations sue for administration or inheritance of the property.

In light of the earlier litigation which indicated the possibility that Khoja women could only inherit a life-interest in any property, it was a remarkable conclusion to the years of disputes between different female members of Rahimbhai Allubhai's family. The case illustrated that, in spite of a discourse limiting Khoja women's rights to life-interest only, if men did not question a woman's right to fully exercise her authority over property, no such restriction was enforced. It should also be noted that in some cases, a restriction worked in favour of another woman, as experienced by Hirbai in the dispute with her sister-in-law. However, these disputes between Khoja women were the exception, the majority of families had a near male relative who, according to Hindu law and most Khoja men, had the right to inherit before any female relation. The articulation of such views deserve additional attention.

Khoja Men on Khoja Women's Rights of Inheritance in 1875

The ambiguity regarding the application of Hindu law to the Khojas was revealed in many instances. Quite telling was the testimony of witnesses in the 1875 *Hirbai v. Gorbai* case, nearly thirty years after the original Khoja Female Inheritance cases. Most witnesses had no understanding of Hindu law. Often, the influence of the court on this matter was paramount. As the courts ruled that disinheriting daughters accorded with Hindu law, Khojas themselves began to accept this as meaning Hindu law prevailed in matters of Khoja succession and inheritance. While references to daughter's having some rights continued to surface, and, as will subsequently be seen, some fathers tried to provide for their female

¹⁴⁷ *Mawjibhai v. Muljibhoy* (1902) 4 Bombay Law Reporter 203-4.

children, the court and male Khoja community overwhelmingly believed that the courts' position was the correct one.

For example, Alladin Premjee stated that "Hindoo law prevails amongst us, because it was so decided by the Courts."¹⁴⁸ He went on to admit that while he knew nothing about Hindu law, he knew that "it prevails amongst us... [as he had] heard of the decisions made by the Court."¹⁴⁹ Other witnesses in the *Hirbai v. Gorbai* case demonstrated that the community learned about Hindu law from the courts. For example, Rahimbhoy Dhurrumsey noted that all his knowledge of Hindu law was derived from a case he brought against Ahmedbhai Hubbibhai.¹⁵⁰ Although his claim was based on Hindu law, prior to engagement with the colonial legal system, Rahimbhoy Dhurrumsey had no conception of what actually constituted Hindu law.¹⁵¹ His counterpart from that suit, Ahmedbhai Hubbibhoy,¹⁵² also stated that "The Khojas have no book of law" and that some of the points of law "have been decided in this Court." He admitted that he knew nothing of the "Mitakshara or Mayukha, or which is most followed by us." He also made reference to how the community followed Hindu law since daughters did not have the right to inherit property from their fathers. Yet acknowledged that "These rules come, I believe, from Hindoo law, but I don't pretend to know Hindoo law."¹⁵³

This equation of Khoja 'custom' with Hindu law by virtue of one generally accepted custom was pernicious. One witness after another revealed that his only understanding of Hindu law was that daughters were not entitled to inherit. Sallay Mahomed Goolam Hoosein knew that the Khoja community was governed by Hindu law only because daughters did not have inheritance rights.¹⁵⁴ Yet another witness stated that he knew "We are governed by

¹⁴⁸Testimony of Alladin Premjee in SRO, JD 1880 31, *H v. G* Hearing, 18.

¹⁴⁹Testimony of Alladin Premjee in SRO, JD 1880 31, *H v. G* Hearing, 19.

¹⁵⁰No reference to the case was provided.

¹⁵¹Testimony of Rahimbhoy Dhurrumsey in SRO, JD 1880 31, *H v. G* Hearing, 6.

¹⁵²Ahmedbhai Hubbibhoy was a member of the reform faction, and, since 1867 openly declared his identity as being a Sunni Khoja. Testimony of Ahmedbhai Hubbibhoy in SRO, JD 1880 31, *H v. G* Hearing, 17.

¹⁵³While Ahmedbhai Hubbibhoy also asserted that "Mahomedan law also provides for the women of the family," he provided no concrete examples or details. He did, however, explain that "We have no adoption as prevails amongst Hindoos. Our marriage laws are on the whole Mahomedan. We don't divorce in the summary manner the Mahomedans do. We usually go before the Kazee or Jamat. We adopt the Mahomedan law with regard to dower." Testimony of Ahmedbhai Hubbibhoy in SRO, JD 1880 31, *H v. G* Hearing, 16-17.

Hindoo law, and Kojah customs... because daughters are not entitled to inherit.”¹⁵⁵ This witness, Meer Alli Dama, was one of the few that made reference to any other indicator of Hindu law. He stated that he had also heard that when a sister does not take a share in her brother’s property, it was Hindu law, therefore Khojas must be governed by Hindu law.¹⁵⁶

Again and again, community members maintained that “[w]e know nothing of Hindoo law in succession and inheritance.”¹⁵⁷ By the same token, it was also admitted that there “is no law regulating inheritance amongst us. We don’t go by the Koran.”¹⁵⁸ Since the colonial legal system required one or the other, with limited exceptions, the room for abuse of the peculiar position of the Khoja community became clear. Any man who wished to deny a Khoja woman’s rights could allege a Khoja ‘custom’ which the court then had to consider. Khoja women, as Muslims, did not receive the equivalent of their natal parents’ property in the form of dowry as many Hindu women did.¹⁵⁹ Yet they were also cut off, by the application of Hindu law, from Muslim rights of inheritance. If Khoja women did not inherit their husband’s or son’s estates, they were at the mercy of male relations for provision of adequate maintenance. Particularly for widows, maintenance was often set at such an absurdly low rate, even in wealthy families, that remarriage was an accepted recourse for destitute Khoja widows.

What is most remarkable is that even when most witnesses asserted that Khojas were governed by Hindu law because daughters did not inherit, there were still some Khojas who argued in favour of daughter’s rights. Dhanjeebhoy Ragoo asserted that a daughter, particularly if she was the most capable, would take the property before the mother. Ragoo stated: “The daughter can do what she likes with the property but she must provide for the maintenance of her mother and grand-mother.” Further, if the daughter succeeded to any

¹⁵⁴Mahomed Goolam Hoosein stated: “Because the daughter does not inherit I consider the Hindoo law obtains in our community. I have also heard it from other members.” Testimony of Sallay Mahomed Goolam Hoosein in SRO, JD 1880 31, *H v. G* Hearing, 11.

¹⁵⁵Testimony of Meer Alli Dama in SRO, JD 1880 31, *H v. G* Hearing, 19.

¹⁵⁶Testimony of Meer Alli Dama in SRO, JD 1880 31, *H v. G* Hearing, 20.

¹⁵⁷Testimony of Khakee Puddumsey in SRO, JD 1880 31, *H v. G* Hearing, 52.

¹⁵⁸Testimony of Kulpan Ruttonsey in SRO, JD 1880 31, *H v. G* Hearing, 23.

¹⁵⁹It has been argued that dowry represented a daughter’s right to property of her natal family. For a discussion of the issues, see: Lucy Carroll, “Daughter’s Right of Inheritance in India: A Perspective on the Problem of Dowry” *Modern Asian Studies* 25, 4 (1991), 791-809.

property “it goes on her death to her heirs.”¹⁶⁰ This witness disputed the application of Hindu laws and usages to the community. He indicated instead that “we are governed by our own customs.”¹⁶¹ He was, incidentally, one of the few Khojas who could read the Koran in Urdu.¹⁶²

A different witness also asserted that a daughter did have some limited rights. For example, where a man died leaving a brother and daughter, if the property was ancestral and a joint estate, then the brother inherited it. However, if the property was self-acquired, then it belonged to the daughter. Alternatively, if a partition had occurred and the deceased had already taken his share of the ancestral property, then once again, the daughter would inherit.¹⁶³ Although this example was provided in the absence of direct male heirs, a mother or widow, it proves that the position regarding the denial of a daughter’s rights of inheritance was not universally shared. These two lone voices were virtually ignored by the colonial legal system. Instead, patriarchal assertions regarding limitations on Khoja women’s rights of inheritance and disposition of property prevailed.

Beyond the rhetoric and sweeping generalizations of the male Khoja discourse lay a different reality. In practise, women were able to both inherit and bequeath property. As long as no one objected, Khoja women were able to manage and dispose of property without restriction. It was only when disputes came before the courts, that ideas regarding the restriction and limitation of women’s rights to property surfaced. In the process of articulating customs or practices, Khoja men espoused conservative notions which were more a reflection of an ideal than reality. The courts then accepted these general assertions and gave them the force of law. In turn, Khoja men were informed by court decisions and this then *became* their customs and practices. It was a vicious circle which created new norms for the community with negative consequences for Khoja women.

Despite this, if nothing else is demonstrated by the cases examined here, Khoja women were not afraid to engage the colonial courts in litigation. Just as earlier Haji and Sajun Mir

¹⁶⁰Testimony of Dhanjeebhoy Ragoo in SRO, JD 1880 31, *H v. G* Hearing, 33.

¹⁶¹Testimony of Dhanjeebhoy Ragoo in SRO, JD 1880 31, *H v. G* Hearing, 37.

¹⁶²Testimony of Dhanjeebhoy Ragoo in SRO, JD 1880 31, *H v. G* Hearing, 35. It should be noted that his reliability as a witness was questioned by the court in the following cases: *In the Goods of Mulbai*, the 1866 Aga Khan case, and also the *Hirbai v. Gorbai* case.

¹⁶³Testimony of Canjeebhoy Heerjee in SRO, JD 1880 31, *H v. G* Hearing, 59.

Ali's widows and daughters provoked litigation and disputes which went on for many years, so too did other families. Rahimbhai Allubhai's estate was such an example of property which was under dispute by female family members for over thirty years.¹⁶⁴ If disinheriting daughters and limitations on women's management of property truly entrenched customs, why would these women feel justified in provoking litigation? Obviously, they did not agree with the assertions being made by Khoja men and accepted in the courts. It is highly probable that these women's own assertions regarding their rights to property were closer to a true reflection of Khoja custom in operation, given the wealth of specific evidence to support their claims, despite more general articulations of customs to the contrary. It was also notable that the community's own decision making body, the *jama'at khana*, was less and less consulted on any substantial disputes regarding inheritance and succession.¹⁶⁵

Conclusion

Many scholars of women and Indian colonial history have remarked on how it was no accident that debates over the position of women were crucial to both British and Indian reform efforts. Barbara Metcalf noted: "The importance of regulating women is clearly significant."¹⁶⁶ One conspicuous method of regulating women was the judicial system. An examination of the colonial legal system, in operation, revealed a wide array of flawed arguments, misconceptions, and decisions which were not necessarily reflective of the community's experience. As is seen in the Khoja community, on the one hand there were dynamic women who took part in business and argued strenuously for their rights. On the other hand, there was an array of men who had different agendas and understandings of the

¹⁶⁴*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 294; *Rahimatbai v. Hirbai* (1877) 3 Indian Law Reports, Bombay Series 34; *Mawjibhai v. Muljibhoy* (1902) 4 Bombay Law Reporter, 199. As will be seen in the next chapter, Rashid Karmali was similarly involved for many years in litigation. Ahmedbhoy Habibhoy and Sir Currimbhoy Ibrahim were also involved in a wide range of litigation, often regarding their businesses.

¹⁶⁵Several witnesses indicated that for wealthy Khojas, the court was the preferred option. It was also alleged by some witnesses, though never substantiated, that in disputes before the *jama'at* the "influential party takes the property." What was revealed by the testimony, above all, was the responsiveness of the *jama'at khana* to the individual circumstances of the parties involved and that there was "no settled custom." Testimony of Kulpan Ruttonsey in SRO, JD 1880 31, *H v. G* Hearing, 23.

¹⁶⁶Barbara Daly Metcalf. "Polemical Debates in Colonial India" Religious Controversy in British India. Dialogues in South Asian Languages, Kenneth W. Jones, ed., (New York: State University of New York, 1992), 231.

situations. These were both the Khoja men involved with providing testimony as to Khoja 'custom,' and European or Anglo-Indian trained solicitors and judges. Neither group was generally disposed to put the interests of Khoja women first.

The decisions regarding Khoja female inheritance, and the manner in which they were decided, require careful scrutiny. As was exposed here, there were a number of flaws or biases in the way evidence was heard and decisions rendered. At times, rulings appeared to have rested more on the weaknesses of the solicitors' arguments than on a definitively established custom. This was likely the case in White's representation of both Gangbai in the 1863 *Gangbai v. Thavar Mulla* case and Karim Khatav in the 1863 *In the Goods of Mulbai* case.

The limited consultation with the community to establish a 'custom' prior to *Hirbai v. Gorbai* revealed another weakness. Justice Couch in the 1866 *In the Goods of Mulbai* case was content with only a few witnesses, and also chose to ignore some testimony entirely, while being equally selective in the evidence he found convincing. Also, allegations of influence brought to bear, by either the Aga Khan and his supporters or the reform party, were almost universally ignored by the court, despite the awareness by all of the high profile wider community conflict. The belief that justice was blind to such considerations was absurd in the face of specific agendas and partial testimony.

Similarly, the judgements themselves were a testament to misapplication of the 1847 decision. Here, Sausse can most readily be held accountable. The easy acceptance¹⁶⁷ of Sausse's judgment in *Gangbai v. Thavar Mulla* by subsequent judges is most revealing. For example, when Justice Sargent reviewed Sausse's decision in the *Gangbai v. Thavar Mulla* case, he noted that:

Although... there was no actual necessity for deciding the question whether Khojas were governed by Hindu customs and laws of inheritance [it was assumed that Sausse's] statement as to the law of inheritance by which Khojas were governed must have reference to the established practice of the Court in dealing with questions of succession in any one of its several branches of jurisdiction.¹⁶⁸

¹⁶⁷Until Beaman raised objections in *Datu v. Jaffer* (1913) Indian Law Reports, Bombay Series 449.

¹⁶⁸Judge Sargent in *Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 302. Sausse, in his judgement, made no reference directly or indirectly to any other case than the 1847 Female Inheritance ones. It is notable that in the unreported 1862 Dossa Nanji case, Sausse already imposed the Hindu legal limitation on a Khoja woman's right to manage property. This was with no significant evidence or testimony other than the

Sargent also believed that “so careful a judge as Sir M. Sausse would not have mistaken the *real point* decided by Sir E. Perry.”¹⁶⁹ As has been demonstrated here, Sausse very well may *have* been mistaken both in grasping the main point of Perry’s decision, and of the true position of the Khoja community *vis-a-vis* colonial understandings of Hindu and Muslim law.

However, other judges, like Westropp and Green in the 1877 *Rahimatbai v. Hirbai* case, were equally culpable for their assumption that they were the enforcers of a strict application of Hindu law to the Khoja community. This was despite the fact that the Khoja women involved did not see themselves governed by the limited rights to inheritance permitted by colonial interpretations of Hindu law.

Even the various judgements revealed considerable differences of opinion with regards to Khoja women’s rights. For example, Justice Chandarvarkar in the 1902 case of *Mawjibhai v. Muljibhoy* saw fit to uphold the will of a Khoja woman, and felt no need to consider whether the distant male relations party to the suit were the rightful heirs. In fact, this question never arose. Instead, the case examined whether Hirbai, Valubhai and Kesserbai’s wills were being properly administered. As will be seen in the following chapter, when men were the administrators or heirs of property inherited from Khoja women, the validity of their wills were upheld and/or decided in the men’s favour. Property these women inherited was treated as an absolute inheritance -- not life interest. Whereas when it was a dispute between women, all inheritance, gifts, annuities and so forth were seen as life-interest only. Thus, when men were not direct beneficiaries of an inheritance from a woman, it was increasingly asserted that Khoja women could not inherit absolutely, and increasingly more and more limited rights to inherit were imposed.

This revealed a definite shift in perceptions was taking place. An assumption by Khoja women that if they inherited, they did so absolutely, changed to a perception by the courts that Khoja woman inherited for life-interest only. This view fostered in the courts influenced Khoja men and, as will be seen with the Law Commission and debates over a proposed bill governing Khoja inheritance and succession, this presupposition became increasingly

niece’s objection and very well may have been a reflection on his own prejudices regarding womens rights to own property.

¹⁶⁹Judge Sargent in *Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 302. Emphasis added.

entrenched in the community as well. Despite this, or perhaps because of this, certain Khoja men attempted to provide for their female family members through the provision of annuities or gifts in their wills.

Chapter Five

Gifts, Divorce and Maintenance:

Khoja Custom, Hindu or Muslim Law?

Chapter Five

GIFTS, DIVORCE AND MAINTENANCE: KHOJA CUSTOM, HINDU OR MUSLIM LAW?

In addition to the cases of female inheritance discussed in the previous chapter, questions over related issues such as gifts, divorce and maintenance brought into question the whole issue of the application of Hindu law to the Khoja community. It became increasingly evident that the contradictions between the application of Hindu law, in matters of inheritance, and Muslim law, in matters of marriage and divorce, were creating real injustice. Allegations of unique Khoja 'customs' only further complicated this legal tangle. This situation eventually led to attempts at creating legislation, as will be seen in the following chapter. However, in the absence of any particular personal law to govern the Khojas, the community found new ways to get around the increasingly rigid application of Hindu law in disputes over succession and inheritance.

At the turn of the century, there were significant shifts within the Khoja community. The majority of reform party Khojas openly split from the Aga Khan and declared themselves to be Sunni Muslims. By the late nineteenth century, other dissident Khojas converted to Ithna 'Ashari Shi'a Islam. Tensions between the various factions flared from time to time.¹ With these shifts also came new choices in terms of inheritance practices. All factions began to move closer to Islamic traditions more in consonance with their declared identity, be it Sunni, Ithna 'Ashari Shi'a or Aga Khani Isma'ili Shi'a.² More generally, efforts at eliminating Hindu elements in Khoja customs and beliefs began to take hold, with the singular exception of the application of Hindu law in matters of intestate succession and inheritance. Urdu replaced Kutchi and Gujarati as the language of choice for more educated Khojas. The growing Muslim awakening as a separate and distinct Indian community led to

¹As noted above, several members were murdered in 1852. These tensions continued to flare and another bout of murder took place in the late nineteenth century. Minute by J. Gibbs, dated April 2, 1878 in NAI, Home, JD October 1881, Program 127, Index 22. Violence and persecution against Shi'as who split off from the Aga Khan in the 1880s is mentioned in Ishvani, *Girl in Bombay* (London: Pilot Press, 1947), 7-10.

²F. L. Latham, Advocate General and counsel in the *Hirbai v. Gorbai* case noted in a letter, dated August 17, 1885, to Macpherson, Under Secretary to Government, Judicial Department, that "The present wave of revival of the Muhammadan faith has in many cases made the members of these tribes [such as Khojas and Kutchi Memons] feel thus denied from the Muhammedan Law of Succession to be an offense against their religion..." Letter No. 55 of 188 in SRO, JD 1885, 25, 113-9.

political involvement. The formation of the Muslim League, and agitation for both an end to imperialism, and the creation of Pakistan, strongly affected the various Muslim communities - the Khojas were no exception.

The changes within the Khoja community's own understanding of their legal position were reflected in the way in which they wrote their wills, the kinds of gifts they chose to make, and how they treated issues such as maintenance and partition. It was generally assumed that matters of Khoja intestate succession, testamentary powers, maintenance and so forth were governed by Hindu law. Disputes concerning marriage and divorce were presumed to be governed by Muslim law. The law to govern the disposition of wills, gifts, and annuities, by contrast, was either Hindu or Muslim law, or an amalgam of both, as there were many areas of overlap. For example, if Khojas were governed by Hindu laws of inheritance, they then could dispose of an entire estate by will, or allocate certain portions to be disposed of as gifts. Therein lay a quandary -- gifts were not merely disposed of by will, but also during one's life-time. Did disputes over the validity of gifts then come under Hindu or Muslim law? What exactly were the implications of each? Under what circumstances was the court inclined to apply one law and under what different circumstances were judges inclined to apply the other? What about partition and obligations of men towards their dependents when alienating either self-acquired or ancestral property? Further to this, where did the whole problem of maintenance of a wife, divorced spouse, widow and / or mother fall? The whole range of personal disputes required legal responses as wealthier Khojas increasingly brought their problems before the colonial courts rather than the *jama'at khana*.

The 1847 Khoja Female Inheritance cases affected the legal status of all Khojas. The choices by various judges to extend the application of Hindu law in all matters of female inheritance led to its application in other areas such as partition, maintenance and, to an extent, testamentary powers and gifts.³ However, as the Khoja community, regardless of sect, moved towards identification with mainstream Islam wills began to be written in closer accord with general Islamic norms. At the same time, identification with Islam in divorce and maintenance of divorced spouses had an extremely negative impact on the position of Khoja

³For a brief discussion on the ambiguous manner in which the courts treated Khoja testamentary powers, see: S. R. Dongerkery, The Law Applicable to Khojas and Cutchi Memons (Bombay: n.p., c. 1929), 5.

women. Similarly, while maintenance according to Hindu law was upheld, the stipends were usually so low that widow remarriage was very common, whether by choice or economic necessity. The courts demonstrated no sympathy for, or readiness to acknowledge, the difficult financial plight Khoja women faced as rights of inheritance were eroded while other options to access sufficient resources for survival through maintenance were often absurdly low. The more pernicious aspects of Hindu treatment of women were retained in areas such as inheritance and limited maintenance, while a woman similarly could be unilaterally divorced and cut off from all rights to alimony, maintenance or the like under Muslim law. These, then, are the issues explored in this chapter.

Wills, Annuities and Gifts: Hindu or Muslim law?

Gifts and annuities contained in wills fell into a category of Khoja inheritance that was treated with considerable ambiguity in the courts. Some judges decided the validity of a gift or annuity by will according to Hindu law, others by Muslim law. In order to unravel the manner in which the courts decided cases regarding gifts, it is essential to understand the main features of Muslim and Hindu law regarding gifts and annuities by will.

According to the British construction of Muslim law, a Muslim could not dispose of, by will, the totality of his or her estate. Only one-third of an estate could be disposed of without question, the rest was split into various portions for the relatives of the deceased. There were also specific guidelines for the validity, disposal, and nature of gifts (*hiba*) according to Muslim law.⁴ Gradually, a formula was developed and accepted in the courts which determined who got what and how much, according to the sect to which the deceased belonged. Thus, differences existed in the allocations of the estate of an Ithna 'Ashari Shi'a and a Sunni Muslim.⁵ Particularly a gift made by a Muslim during a 'death-illness' (*marz-*

⁴For more information regarding gifts in Muslim law in modern India with references to significant precedents from the colonial period, see: Aqil Ahmad, Mohammadan Law 17th ed., (Allahabad: Central Law Agency, 1995), 160-86 and Paras Diwan, Muslim Law in Modern India (Allahabad: Allahabad Law Agency, 1977), 137-54.

⁵Examples of these formulas may be found in both Ahmad, Mohammadan Law, 274-314 and Diwan, Muslim Law in Modern India, 155-202. For a more recent consideration of these formulas, see: Lucy Carroll, "The Hanafi law of Intestate Succession: A Simplified Approach" Modern Asian Studies 17, 4 (1983), 629-670 and Lucy Carroll, "The Ithna Ashari Law of Intestate Succession: An Introduction of Shia Law Applicable in South Asia" Modern Asian Studies 19, 1 (1985), 85-124.

ul-maut), had specific restrictions, unless all of his or her heirs gave their consent.⁶

By contrast, a Hindu could dispose, by will, of the entirety of his or her personal or self-acquired property. Restrictions were placed on ancestral property and property held jointly with a sibling, parent, etc. As such, there were no specific portions, but it was generally assumed that brothers would divide their father's property equally if living jointly and so forth. Women had only rights to maintenance if a near male relation survived. In an undivided estate, the nearest male relation always inherited. In a divided estate, the widow could inherit if there were no sons, grandsons or great grandsons.⁷

A gift or annuity by will was an option sought by both Khoja men and women to control the disposition of their property. A trust could be set up, usually to support charitable activities, or provide annuities for descendants. A will was used to specify an heir, set up conditions of inheritance and establish the testator's preferences regarding the disposition of his or her estate. Wills could also be used to circumvent iniquitous rules recognized by the courts. This did not always succeed, as was seen in *Rahimutbai v. Gorbai*, because gifts as charity had to follow certain British rules before they were accepted by the court. Similarly, choosing how to portion off one's estate was not always sufficient. Such provisions could be modified or overturned by the court if it deemed them inconsistent with British, Hindu or Muslim law.

As earlier cases demonstrated, Khoja women asserted that they had the right to inherit property and to dispose of such property by will. As will be seen in the following cases regarding the giving of gifts by will, Khoja men wrote wills leaving specified portions or annuities to wives and daughters in an effort to circumvent the iniquitous aspects of Hindu law as applied to their community. These Khoja wills also revealed a move towards mirroring Muslim, not Hindu, rules of succession. Such decisions challenged the assumption by the court that the Khoja community followed Hindu law to the extent determined by the earlier judicial decisions. Rather, it demonstrated the flaws in earlier judgements which presumed Hindu law, as interpreted by the colonial courts, prevailed in all matters relating to succession and inheritance in the Khoja community, not merely the general practise of property not being

⁶M. Hidayatullah and Arshad Hidayatullah Mulla's Principles of Mahomedan Law 19th ed., (Delhi: N. M. Tripathi, 1990), 109-11.

⁷For a comparison of succession in a divided and undivided family according to Hindu law and Khoja 'law', as proposed in an 1880 Bill regarding Khoja succession and inheritance, see Appendix III.

inherited by daughters in Western India in the early to mid-nineteenth century.

Absolute gift in favour of a man: *Husenbhoy v. Ahmedbhoy*, 1902

It is fitting to determine how the courts dealt with a case in which a Khoja woman left property by will to a man, in order to contrast it with how property left as a gift to a Khoja woman and her heirs was treated in the colonial courts. In the *Husenbhoy v. Ahmedbhoy* case, the court chose to ignore a specific codicil in the Khoja woman's will in order to uphold the right of her designated male heir to inherit her property immediately, with no restrictions.⁸

An unmarried Khoja woman, Fatimabai, died on May 20, 1892. She left an estate valued at over Rs. 10,000 and a will, dated March 12, 1890. She made her paternal uncle's youngest son, Husenbhoy Ahmedbhoy, her sole heir. She appointed Ahmedbhoy Habibbhoy, her paternal uncle and her heir's father, as executor of her estate until Husenbhoy turned twenty five years of age. A dispute arose between her executor and heir, with the case coming before Justice Starling⁹ at the Bombay High Court, Original Civil side, on June 15, 1901. Advocate General Basil Scott provided counsel for the plaintiff, Husenbhoy Ahmedbhoy. Ahmedbhoy Habibbhoy, the defendant, was represented by Reginald M. Branson, who came from a family of barristers. Unlike most English lawyers, Branson practised mostly on the Appellate Side with criminal cases and was known for his forceful and effective delivery.¹⁰

⁸*Husenbhoy v. Ahmedbhoy* (1902) 4 Bombay Law Reporter 336.

⁹In his Bombay legal career, Starling acted as Clerk of the Crown, Advocate General and judge. He was known to be an excellent advocate and had the confidence of Bombay barristers who supported his promotion to judge in the Bombay High Court. He was thrice overlooked by the administrative side in a feud which led to several memorials to government by Bombay barristers. On the first occasion when a judge from the Allahabad High Court was appointed over Starling, the barristers wrote a stinging memorial in his defense, forwarded November 1895 to Lord George Hamilton, Secretary of State for India. The barristers pointed out the cosmopolitan and commercial character of the communities residing in Bombay and that the litigation reflected such diversity. They further noted that any judge appointed to the position with a background only in Appellate Side judgements from a "remote inland city" like Allahabad, would be completely unsuitable and inadequate to the task of handling the practice and procedure in the Bombay High Court, particularly Original Side. Affronted by the temerity of the Bombay barristers, the government chose to bring in judges from outside of Bombay on two successive occasions. Starling never became Chief Justice of the Bombay High Court although he acted as Chief Justice in a temporary capacity on several occasions. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 116-7, 133.

¹⁰Reginald Branson was the son of a barrister, James Branson, who practised mainly in Madras. All three of his brothers were also barristers -- one in Madras, the other in Calcutta while the third brother remained

The Advocate General argued that as Husenbhoy was already twenty one, three years past the age of majority, he was legally entitled to the property bequeathed to him by Fatimabai.¹¹ Counsel denied the executor's argument that the will provided an absolute gift in favour of the executor until the heir turned twenty five. Instead, it was asserted, the executor was clearly only meant to keep the property in trust for the heir until the heir took full ownership and management. Scott further argued that as the executor was also the father of the heir, it was likely that the heir was intended to benefit from the estate even while administered by the executor.¹²

Justice Starling ruled in favour of the applicant and heir, Husenbhoy. It was determined that the executor was only a trustee. Since Husenbhoy was past the age of majority and otherwise competent, he could not be deprived of what was bequeathed to him, irrespective of the age clause in Fatimabai's will. The executor appealed the decision on August 2, 1901. The original judgement was confirmed by Chief Justice Sir Lawrence Jenkins¹³ and Justice L. P. Russell.¹⁴ On September 20, 1901, the defendant, Ahmedbhoy, applied to bring

in Scotland, where the family originated. Branson was called to the Bar from the Middle Temple in 1865 and, as noted above, practised largely on the Appellate side with important criminal and civil appeals. He was considered one of the most distinguished barristers, along with Macpherson and Iverarity. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 112, 132-3, 247, 253, 265.

¹¹There was considerable debate over what actually was the age of majority. It was finally determined that according to all Anglo-Indian legislation, Husenbhoy had reached or was past the age of majority, and thus was considered an adult. It is interesting to note that suggestions ranged from 16 to 25 years.

¹²It may have been that the son no longer lived with the father at the time of the dispute. In the judgement it was noted that: "Looking at the fact that the executor and the trustee was Husenbhoy's father, and that according to the custom of the country he would likely *under ordinary circumstances to be living with his father until he was twenty-five*, I am of opinion that these words do not constitute an absolute gift to the defendant for his own benefit, but that he, as trustee, could use the interest for such purposes as a trustee could properly use it without rendering an account, and that power to use the interest as trustee would cease as soon as the legatee was in a position to claim to have the property handed over to him". *Husenbhoy v. Ahmedbhoy* (1902) 4 Bombay Law Reporter 338. Emphasis added.

¹³Sir Lawrence Jenkins was born December 22, 1858 and educated at Cheltenham College and University College, Oxford where he completed a B.A. in 1881. He was called to the bar from Lincoln's Inn November 17, 1883 and began his practice in the Chancery division of the High Court. He was appointed puisne judge of the High Court of Calcutta. Jenkins was one of the judges brought in from outside of Bombay to prevent the promotion of Starling noted above. Jenkins retired from the Bombay High Court in 1908. He also sat on the Judicial Committee of the Privy Council. He was known for supporting Indian advocates and breaking the monopoly of European barristers on the Civil Side. His support of Indian lawyers like Sir D. F. Mulla, Sir Chimanlal Setalvad, Raosaheb Vasudeo Jagannath Kirtikar and Ganpat Shibram Mulgaonkar was notable. In testament of his status as one of the greatest Chief Justices of the Bombay High Court, a marble statue at the Bombay High Court was erected in Jenkins honour along with a statue in honour of Sir D. F. Mulla. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 48, 67, 117, 152, 158, 168, 179, 217 and "Sir Lawrence Jenkins", Bombay Law Reporter 2 (1900), 2-3.

forward an additional appeal, this time before the Privy Council. The application for appeal was dismissed and the original judgement was upheld.¹⁵

The case is conspicuous for several reasons. First, it is important to note that the estate was not small. Rs 10,000 was a significant sum, and it is notable that a Khoja woman held this property absolutely. Second, there was no challenge to Fatimabai's right to make a will, nor to designate her paternal uncle's youngest son as heir. Fatimabai was able to dispose of her entire estate, thus her will was accepted as being in accordance with Hindu, not Muslim, law. Had the will been governed by Muslim law, she would have been able to provide a gift in favour of Husenbhoy up to one third of the value of the estate, and no more. Third, while upholding her right to distribute her property as she saw fit, the court felt the age restriction was unreasonable and chose to ignore a specific codicil in her will. Given the that the heir was past the age of majority, and there was obviously a strong conflict between the parent/executor and son/heir, the court's decision may have been justified. As has been demonstrated in previous cases, and will be seen in subsequent cases, the court did not feel a similar responsibility to protect the interests of Khoja women in very difficult circumstances.¹⁶

Annuity in favour of a daughter: *Advocate General v. Karmally* , 1902

One way in which a Khoja could get around the denial of a daughter's right of inheritance under Hindu law was to leave an annuity in his/her will in favour of a daughter. A dispute occurred when a Khoja father, Khan Mahomed Habibbhoy, attempted to leave an annuity for his daughter and her heirs. He left a will, written in English, according to which he requested the establishment of a trust from his estate. His trustees, Rahamubhai Habibbhai and Ahmedbhoy Habibbhoy, were charged with responsibility of making monthly payments

¹⁴Russell later heard the 1909 *Haji Bibi v. H. H. Sir Sultan Mahomad Aga Khan* case. Russell was also for many years president of the Bombay Gymkhana. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 222, 290.

¹⁵Ardeshir, Hormusji, Dinshaw and Company represented Ahmedbhoy in the application, while Tyabji, Dayabhai and Company, represented Husenbhoy. *Husenbhoy v. Ahmedbhoy* (1902) 4 Bombay Law Reporter 339-40.

¹⁶The first indication of this was the judgement against Hirbai and her cousin in the 1847 Khoja Female Inheritance cases. As will be most clearly proven in cases regarding divorce and maintenance of Khoja women, time and again the courts did not view economic necessity as sufficient justification to rule in favour of Khoja women.

of Rs. 1,000 to his daughter, Lilbai, and, on her death, to continue to make payments for her children and heirs.¹⁷ He also made provisions for his widow, and the income of the residuary estate was to go to charity -- primarily in favour of supporting destitute Khoja orphans, regardless of sect or faction. Funds were to help with the maintenance, education and advancement of these orphans and also to defray marriage and other expenses.¹⁸

The annuity had been in dispute since shortly after the death of the daughter, Lilbai, who passed away December 15, 1869, just five years after her father.¹⁹ The conflict was between the two executors of her father's estate and her husband, Rahimbai Dharramsi, on behalf of their children.²⁰ It was still not resolved before Rahimbai also died, April 4, 1876, at which point the children, Karmali, Ebrahim, Merali, and Rahimatbai, were substituted as plaintiffs.²¹ A Commissioner's report, regarding the funds in question, was requested and finalized in July 1889.²² Finally, the dispute came before Justice Tyabji in June 1901, at which point the Advocate General raised questions regarding the validity of the gift to Lilbai's children.²³ An appeal was granted. A simple suit to recover arrears of an annuity became a tangle of Anglo-Indian legal wrangling and judicial contortions.

The case, *Advocate General v. Karmally*, was heard by Chief Justice Sir Lawrence Jenkins and Mr. Justice Russell in November, 1902. The appellant was Advocate General Sir Basil Scott, with Mr. Bailey. Lilbai's eldest son, Karmali Rahimbai, was the respondent and represented himself. Other parties to the suit were unspecified, but likely were Lilbai's other

¹⁷The rate of Rs. 1,000 per month was stipulated in a codicil to the will dated September 9, 1864.

¹⁸*Advocate General v. Karmally* (1902) 4 Bombay Law Reporter 858, 862.

¹⁹Khan Mahomed Bahibbhoy died on October 1, 1864. He was survived by his widow and daughter, and no sons. There was no dispute regarding the maintenance of his widow, which was set at a nominal rate. Parallels exist in the case of Khan Mahomed Hubibbhoy who similarly left only Rs. 109 per month to his widow but Rs. 1,000 to his daughter and her children. Testimony of Ahmedbhai Habibbhai in SRO, JD 1880, 31, *H v. G* Hearing, 16.

²⁰*Advocate General v. Karmally* (1902) 4 Bombay Law Reporter 862.

²¹Rahimbai sued for arrears of the monthly sum and tried to ensure that he administer all future payments on behalf of the minor children. The suit, *In the Goods of Lilbai*, was decided by the Registrar, who granted the letters of administration to Rahimbai on March 9, 1870. The executors did not comply or contested the arrangement, accordingly another decree for Rahimbai's administration was granted on December 5, 1873. The dispute was still not effectively resolved, so an additional suit by Rahimbai was forwarded. Before it could be decided, Rahimbai died and a motion to substitute the children as plaintiffs was made March 31, 1884.

²²An initial report was made in 1884, and confirmed on January 13, 1885, but was again reviewed, with further inquiries made before it was finalized July 1885.

²³The Advocate General requested an appeal of the earlier decisions, which was granted by Chief Justice Jenkins and Justice Russell on October 17, 1902.

children and/or their relations.²⁴

The main points of contention were the validity of the annuity, and which of Lilbai's children were eligible for receipt of the monthly annuity on the death of their mother. Even Habibbhai's right to make out a will was questioned initially. It was decided that, if the Khojas were covered by Hindu law in cases of intestate succession, they then must also be governed by Hindu law in related issues. As a result, a Khoja was deemed to have Hindu testamentary powers and could, thus, will away an entire estate, as long as it was not ancestral property.²⁵

Khan Mahomed Habibbhai's will very clearly stated that he directed his trustees, executors or survivors of them, their heirs or executors, to:

pay to or for the benefit of the said Lilbai and her children the monthly sum of Rupees one thousand out of the interest or income of my residuary estate and that the provisions contained in the foregoing will so far as they direct the mode of distribution of the sum payable to Lilbai in her life time and among her children male and female after her death are applicable to the said sum of Rupees one thousand herein mentioned.²⁶

It is laudable that not only did Habibbhai try to ensure that his daughter benefited, but that her children, irrespective of their gender, did so as well. The will, thus, did not outline reductions for female children, as was found in the report by the Commissioner regarding arrears of the annuity. The report reduced the amount for Lilbai's daughter after she married.²⁷ It is also significant that Habibbhai tried to ensure that his wishes were binding not only on his executors and/or trustees, but also upon their executors and heirs. Habibbhai, thus, intended to ensure a long-term commitment to the legacy in favour of his daughter and her heirs.

In light of this clear indication of the testator's wishes, the limitations placed on the will by the court seem unjustified. First, it was argued that as it could only be determined that the eldest son, Karmali Rahimbai, was alive at the time of Habibbhai's death, only he could

²⁴In total, there were six respondents in the case. Information in the case confirms that both Ibrahim and Rahimatbai were married, so it is possible that their spouses or relations were party to the suit. *Advocate General v. Karmali* (1904) 6 Bombay Law Reporter 601-2.

²⁵*Advocate General v. Karmali* (1904) 6 Bombay Law Reporter 604.

²⁶*Advocate General v. Karmali* (1904) 6 Bombay Law Reporter 603.

²⁷The excuse given for reducing the daughter's annuity was her marriage. The choice may have been a result of the Commissioner's own gender/cultural bias, that of executors or even the daughter's siblings. It was presumed that the remainder was to be divided evenly between her three brothers.

benefit from the gift in favour of his mother. The second son, Ibrahim, may or may not have been conceived at the time of Habibbhai's death, so there was ambiguity regarding his claim.²⁸ As the daughter, Rahimatbai, and the third son, Merali, were born after the death of their grandfather, their claims were dismissed.²⁹ After considerable debate and referral to cases in England, it was finally decided that according to Hindu law, only Lilbai and her children alive prior to the death of her father were entitled to the legacy. However, as all previous dealings in this case assumed that all of Lilbai's children alive at the time of her death were entitled, the judges decided that though legally only Karmali had a right to the annuity, his brothers should also be included as beneficiaries. However, it was determined that the annuity was terminal and could not devolve beyond the children's life-time, nor to their heirs.³⁰

The earlier suit, before Justice Tyabji, made reference to the annuity in favour of the daughter and daughter's heirs as being invalid. Although not specifically stated as such, it appears that the court wondered whether Khoja daughters, as a rule, should be denied such gifts. Although the 1847 Khoja Inheritance cases were regarding intestate succession and it seems absurd to then deny testate succession in favour of a daughter and her heirs, nevertheless, by the early twentieth century, such a line of questioning was opened for debate.

In the 1904 *Advocate General v. Karmally* case, it is apparent that the court chose to recognize a limitation on the will, according to Hindu law. However, given that prior to Tyabji's hearing of the suit for payment of arrears of the annuity, all children were deemed entitled to the monthly gifts, the court ruled that this understanding would be preserved. However, only the male children were mentioned, not the daughter, and no reference was

²⁸Although at one point in the case, Ibrahim's date of birth was listed as 1866, it was only when he was 'probably' born. His grandfather died October 24, 1864. *Advocate General v. Karmali* (1904) 6 Bombay Law Reporter 609.

²⁹Rahimatbai was listed as being born in 1867, one year after when Ibrahim was 'probably' born and one year before Meherali. She was married in 1881. These dates were provided by Habibbhai's widow and written in the account books as debits for the *chhathi* ceremony for a specified child of Lilbai. The court recognized Wilson as the authority on the ceremony and thus dated the ceremony as six days after the birth of a child. *Advocate General v. Karmali* (1904) 6 Bombay Law Reporter 609. For further information on the *chhathi* ceremony, see Patricia Jeffrey, Roger Jeffrey and Andrew Lyon, Labour Pains and Labour Power. Women and Childbearing in India (New Delhi: Zed Books, 1989), 132-5.

³⁰*Advocate General v. Karmali* (1904) 6 Bombay Law Reporter 603-6.

made to the effect of the decision on either her annuity or the reduction of the amount noted by the Commissioner who reviewed the financial situation.

The will proved two things which contradicted the colonial court's understanding of Khoja customs. First, a Khoja father wished his daughter and her heirs to benefit substantially from his estate.³¹ Second, a Khoja was not content to have his property devolve on distant male heirs according to either Hindu law, or the court's rulings on the matter as it pertained to intestate Khojas. Every effort was made to write a will which outlined his concerns, both for his daughter and in favour of creating a charity in support of Khoja orphans. He was responsible in updating his will on three occasions to reflect his changing circumstances, significantly increasing the amount of the annuity for his daughter and her children.³² None of these choices were consistent with the court's understanding of Khoja 'customs.'

"Treat my wife as male": *Moosabhai v. Yacoobbhai*, 1904

An even more direct challenge to the colonial courts' position on Khoja inheritance and succession can be found in the case of *Moosabhai v. Yacoobbhai*. The husband, Mahomedbhai Sajan, specified in his will that his wife, Prembai, was to be legally treated as 'male' and thus have all the inheritance rights of a man. The husband sought to protect his wife from the iniquitous bias held by the colonial legal system and gave her rights equal to Khoja men. Significantly, he specified portions for his descendants in a manner that suggested the influence of Muslim law more than Hindu law, with the exception of providing his wife with an inheritance proportion on par with a male. He also made provisions for both his daughters and daughters-in-law.

The case was decided November 12, 1904 by Justice Badruddin Tyabji. Chimanlal Setalvad,³³ with H. Tyabji, represented the plaintiffs, Moosabhai Mahomed Sajan and his

³¹Obviously, the father wished to ensure that his only child and her children be more than adequately cared for. Rs. 1,000 was a substantial monthly sum, and it appears that Habibbhai was a wealthy man, although the total amount of his estate was never provided.

³²When Khan Mahomed Habibbhoy first wrote his will, he originally specified that his daughter and her heirs be given the sum of Rs. 150 per month. This was later raised to Rs. 250 and then the final codicil confirmed a sum of Rs. 1,000 per month. *Advocate General v. Karmally* (1902) 4 Bombay Law Reporter 858.

³³Sir Chimanlal Setalvad was a distinguished Indian advocate from 1887 to 1897 where he practised as a pleader on the Appellate Side. He then switched to the Original Side and was known for his clear and lucid

wife Kajbai. Advocate General Scott, George Lowndes³⁴ and D. N. Bahadurji,³⁵ provided counsel for the first defendant, Yacoobhai Mahomed Sajan. Davar³⁶ with Bhandarkar were counsel for the second defendant, Gulamalli, and an unnamed fourth defendant. The third defendant, Phoolbai, wife of Yacoobhai, did not appear.

The full details of the case are secondary. It was a dispute between one brother, Yacoobhai, who controlled the estate and another brother, Moosabhai. Yacoobhai seceded from the main Khoja community in March 1901, while all the other members of the family continued to belong to the party of the Aga Khan.³⁷ After this date, Yacoobhai ceased to pay the sum of Rs. 45 per month, an annuity paid in lieu of inheritance, to his brother Moosabhai and his wife. Thus Moosabhai and his wife sought to have the annuity paid to them, according to their rights under the father's will.

As the widow predeceased the husband, her full portion of the estate was never brought into question. It is interesting that Mahomedbhai Sajan specified not only his wife in his will, but also his daughters-in-law. He specifically arranged that they receive a half portion.

Similarly, he made provisions for his two daughters, Mariambai and Padmabai, both of

intellect. His "clarity and [the] precision of his legal argument" attracted the attention of Chief Justice Jenkins who encouraged his career. He was an active member of the Indian National Congress and was also a member of the Municipal Corporation and University Senate. He was appointed by Government on several Commissions and Committees of Inquiry and was for some time a member of the Bombay Legislative Council and later of the Imperial Legislative Council. In 1920, he was appointed Additional Judge of the High Court, but relinquished his post to become a member of the Executive Council of the Governor of Bombay. He also became Vice-Chancellor of Bombay University. He later resigned as Member of Council and returned to the Bombay High Court. There he formed a quartette of Indian advocates with Sir Jamshedji Kanga, Bhulabhai Desai and V. F. Taraporwala. This group helped lead the way for Indian barristers in the Original Side and by 1930 the European monopoly had not only been broken, but had almost "vanished." His politics were staunchly liberal and he was a part of the 'moderate' faction of Congress and did not agree with the younger, more radical elements which dominated Congress in the years leading to independence. He was reputed to have a sociable and affable temper, making him very popular. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 152-4.

³⁴George Rivers Lowndes practised law in Bombay for 25 years, eventually rising to the position of Advocate General. He was involved in high profile cases like the Parsi Panchayat Case, where he led for the plaintiffs. He retired from Bombay in 1912 and returned to England. From 1916-1920, he came back to India as Law Member of the Viceroy's Council. He once again returned to England and resumed practice before the Privy Council. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 144-5.

³⁵D. N. Bahadurji was known for his "strong, tenacious and almost obstinate counsel," not popular amongst his peers, yet commanded great respect from the Bench and Bar for his adherence to high standards of professional practice. He was the first Indian Advocate General of Bombay, and was once offered a position as judge, which he turned down. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 146-7.

³⁶The case does not specify which Davar provided counsel. It was either Sir. Dinshaw Davar or his son, J.D. Davar. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 181.

³⁷*Moosabhai v. Yacoobhai* (1904) 29 Indian Law Reports, Bombay Series 273.

whom were married and living separately from their father. Thus all women were given a half share, while his widow was given a full share and was to be treated as a male inheritor. This indicated that although he felt his daughters and daughters-in-law did not require a full portion, they nonetheless deserved a half portion in their own right. This was intended as their own property and was significant, in that it demonstrated an instance in which a Khoja man made provisions in his will for female heirs -- a choice completely inconsistent with Hindu traditions.

It is remarkable that for the first time since 1847 in a dispute regarding an issue related to inheritance, a judge applied Muslim, not Hindu, law to Khojas. While Yacoobhai's counsel tried to argue that the Khoja community was governed by Hindu law, and hence, both the will and the portioning of the estate argued for by the plaintiffs was invalid, this point was refuted by the judge. Justice Tyabji, himself a Bohra Muslim, declared "I am not disposed to apply the Hindu law to Khojas more than in decided cases."³⁸ He refused to extend the application of Hindu law to gifts, and justified his position by stating that "no authority has been cited, in support of the proposition that Khojas in cases of gifts are governed by Hindu law..."³⁹ It is also interesting to note that Tyabji felt that it made no difference which law, Hindu or Muslim, was applied in this particular case. Thus, Yacoobhai's attempt to obfuscate the proceedings with an appeal to Hindu law failed.

In light of rhetoric regarding the restrictions on a Khoja woman's rights of inheritance in the earlier debates over a proposed Bill for Khoja inheritance and succession, Mahomedbhai Sajan's choices are highly remarkable. Sajan refused to chance that any women in his family would be subjected to Hindu laws regarding intestate succession which disinherited daughters, daughters-in-law and, in his case, would have provided only maintenance to his widow. Sajan clearly chose to write a will heavily influenced by Muslim law, and Tyabji chose to uphold the validity of the will according to Muslim law.

This clearly indicated a shift in legal opinion away from a wholesale acceptance of Hindu law in all matters pertaining to Khoja succession and inheritance. This case was the first which limited the applicability of Hindu law to the Khoja community by specifying that

³⁸*Moosabhai v. Yacoobbhai* (1904) 29 Indian Law Reports, Bombay Series 276.

³⁹*Moosabhai v. Yacoobbhai* (1904) 29 Indian Law Reports, Bombay Series 276.

other issues of inheritance, such as gifts, should be determined according to Muslim law. As legal precedent, this was a significant judgement, and, for the first time, protected the inheritance rights of both daughters and daughters-in-law. Most significant of all, however, was the assertion that the widow was to be treated on par with male heirs.

Provisions for a daughter-in-law: *Mahomedbhai v. Fatmabai*, 1906

A father-in-law's consideration of his daughter-in-law's position in the above case was not unique. Nensey Khairaz attempted, by will, to ensure that his daughter-in-law, Fatmabai, was adequately provided for, and funds were given directly to her for her household management expenses and the education of her children. A dispute arose between Fatmabai and her brother-in-law, Mahomedbhai Nensey, over the amount and manner in which the funds were provisioned. The case came before Justice Stanley Batchelor⁴⁰ on the Original Side of the Bombay High Court.⁴¹

Nensey Khairaz appointed his son, Mahomedbhai, and his brother, Rahimtulla Khairaz, as executors of his will. His will stipulated that a sum of Rs. 60,000 should be set aside in the firm of Nensey Khairaz and Company. Out of the interest, Rs. 300 was to be paid every month to his daughter-in-law, Fatmabai, wife of Huseinbhai, for her household expenses and the education of her children until they reached twenty one or were married. His son Huseinbhai was to receive Rs. 5,000 as a legacy, while the other brothers were to receive equal shares of the residuary of the estate. Nensey further stipulated specific sums for the marriage expenses of any children of Huseinbhai as well, with daughters receiving, in addition to ornaments and marriage expenses, a legacy of Rs. 5,000. On Huseinbhai's death, his funeral expenses were also to be covered by the firm.

Fatmabai, on the death of her husband Huseinbhai, claimed the Rs. 300 stipulated for her in her father-in-law's will. She also requested that the Rs. 60,000 be suitably invested so

⁴⁰Sir Stanley Batchelor was born February 8, 1868 and educated at St. Edmunds College, Ware and University College, London where he earned a B.A. He joined the I.C.S. in August 1889 and served as Assistant Collector and Magistrate at Ahmedabad, Panch Mahals, Broach and Bijapore. In 1894, he was appointed on special duty at the Bombay Secretariat. Thereafter he held a number of judicial positions before being appointed as puisne judge of the Bombay High Court in 1904. He mostly presided over the Appellate Side, though occasionally also sat on the Original Side. He retired at fifty and was conferred the Order of Knighthood. "Sir Stanley Batchelor" *Bombay Law Reporter* 20, 9-11 (June 15, 1918), 17-19.

⁴¹I found no report of the original decision by Justice Batchelor in Original Suit No. 622 of 1905. The appeal, No. 1428, included excerpts of Batchelor's original decision.

that she could be assured of receiving interest to the amount of Rs. 300.⁴² The court entertained the question of whether Fatmabai was, on the death of her husband, entitled absolutely to her husband's portion -- a one-third share of the estate. Both claims were opposed by the brother, Mahomedbhai Nensey, who had earlier argued that on the death of Fatmabai's son, she "ceased to be entitled to the income altogether."⁴³ Then the executors argued that it was not necessary for them to provide Fatmabai with Rs. 300 per month, merely an amount they deemed sufficient for household needs.⁴⁴

The court ruled that Fatmabai had a right to the stipulated Rs. 300 per month and ordered the executors of the estate and trustees of the firm to pay her all arrears owed.⁴⁵ The court also determined that on Fatmabai's husband's death, intestate, his son inherited his one-third share of the property in question. Fatmabai, in turn, inherited the share as heiress of her son, on his death. The court decreed that Fatmabai had a right to take possession of her portion of the property at once, and her unmarried daughter had a right to maintenance.⁴⁶ Thus, Fatmabai had a right to inherit the property as a *mother*, not as a daughter-in-law or widow.

Mahomedbhai immediately appealed the original decision. The appeal came before Chief Justice Jenkins and Justice Frank Beaman⁴⁷ on July 30, 1906. Mahomedbhai's

⁴²Huseinbhai had filed a suit in the High Court for the administration of the estate of his father in 1896. The suit ended in a consent decree on March 22, 1897 whereby the executors were ordered to set up the firm and fulfill the stipulations contained in the will. Huseinbhai died November 1, 1898 and shortly thereafter his son also passed away. Both his widow, Fatmabai and his daughter, Shirinbai, survived him. *Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 617-8.

⁴³*Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 620.

⁴⁴This was presumably based on an assumption that a daughter required no education and that a woman had limited needs. It was pointed out that Nensey's widow received only Rs. 75 per month, however she was also supported by her sons whereas it appeared that Fatmabai lived independently.

⁴⁵*Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 621.

⁴⁶*Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 625.

⁴⁷Sir Frank Beaman was one of the most interesting characters to sit on the Bench of the Bombay High Court. He was born in 1858 and joined the I.C.S. in 1879. His first position was Collector of Bombay, then Assistant Collector at Ahmedabad and Panch Mahals. He left the Revenue Department in 1883 and was appointed Assistant Judge at Ahmedabad. He also served in Judicial capacities in Rajkote, Kathiawar, Baroda State, Broach, Thana, Nasik and Belgaum. In 1901 he was appointed Judicial Commissioner and Judge of the *Sadr* Court in Sind. In 1906 he became puisne judge at the Bombay High Court where he mostly sat on the Original Side. What is most remarkable was that his eye sight was severely impaired and by the end of his career he was blind. He compensated for this disability by using a combination of memory, dictation and notes taken in an improvised Braille. Another hallmark of his judicial decisions was a complete examination of the facts and a reluctance to rely solely upon precedent. "Sir Frank Beaman" Bombay Law Reporter 20, 23

attorney again argued that Fatmabai had a right to only “so much thereof as the trustees may see fit to allow her.”⁴⁸ Mahomedbhai also contended that Justice Batchelor erred when he determined that there was any intestacy. Hence Fatmabai, as mother of Huseinbhai’s son, was not entitled to a one-third share of the Rs. 60,000.

In making his judgement, Jenkins considered several points. Jenkins had the will retranslated from Gujarati to try and clarify what was actually intended. Based on this, Jenkins came to the same conclusion as Batchelor.⁴⁹ Jenkins again found that Fatmabai, as heiress of her son on whom Huseinbhai’s interest devolved, was entitled to the one-third share she claimed in the balance of Rs. 60,000. Jenkins also determined that, since Fatmabai’s monthly stipend was paid from the capital of Rs. 60,000, once she took possession of her portion (Rs. 20,000) the monthly stipend would, henceforth, be reduced by a proportionate amount. It was assumed that she could or would earn the equivalent in interest from her wealth.⁵⁰ Beaman fully concurred with Jenkin’s ruling.

An additional consideration was the rights of Hussenbhai’s daughter, Shirinbai. It was determined that she had both the right to maintenance and education. It was further decided that Fatmabai should “settle on Shirinbai absolutely one-third of the one-third share of the corpus awarded to Fatmabai by this decree.”⁵¹ No reason or explanation was given as to why Shirinbai’s separate application was entertained and granted. However, it is interesting to note that the decision in favour of Shirinbai was highly remarkable, as she was not entitled to inherit the estate as a sister or daughter, according to Hindu law or Hindu law modified by Khoja custom. No reference was made to either laws, only to English cases with similar

(December 15, 1918), 1-6 and Vaccha, Famous Judges, Lawyers and Cases of Bombay, 91-93.

⁴⁸*Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 628. This position was based on a particular interpretation of one sentence in the will which read: “the net income [of the firm set up with Rs. 60,000] thereof be paid to Fatmabai in accordance with the directions in the said will contained.” One understanding of the latter part of the sentence was that the trustees of the firm were only required to provide what was necessary for maintenance of the household and education of the children. There being only Fatmabai and one daughter, unmarried and a minor, it was presumed that Rs. 300 was in excess of what was necessary for either household expenses or education. *Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 628.

⁴⁹Specifically, Jenkins decided that no provisions were specified in the event that both Huseinbhai and any sons by him died leaving a widow and daughter. Similarly, as Huseinbhai died without making out a will, a state of intestacy indeed existed. He also found that the two surviving sons of Karim Nensey, Mahomedbhai and Cassumbhai, and Fatmabai were each entitled to a share of the estate.

⁵⁰*Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 631.

⁵¹*Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 631.

circumstances.

It is notable that Karim Nensey appeared to have taken considerable pains to ensure the welfare of his daughter-in-law. He could have simply divided his property equally between all three sons, and left provision of maintenance at their discretion. Instead, he chose to set aside a portion of his estate as a separate firm, the interest of which he used to guarantee financial security for his daughter-in-law's household and children's education. It is also remarkable that he also specified that any daughter of his daughter-in-law had the right to a legacy of Rs. 5,000 on her marriage -- an amount equal to the legacy he gave outright to his son, Huseinbhai. The effort taken to protect his daughter-in-law, Fatmabai, appeared justified in light of the litigation and positions taken by her brothers-in-law. Nensey did not appear to have similar fears that his widow would be ill-treated, as he specified maintenance of only Rs. 75 per month, and it was assumed that she would continue to reside with and be cared for by one of her sons. Thus, while he appeared confident that his widow would be adequately supported, he sought to directly ensure that Fatimbai would have the means to support herself and her household.⁵²

Aside from the specifics of the case, the legal implications were remarkable for a number of reasons. First, the dispute was never explicitly identified as Khoja.⁵³ In all other cases concerning Khojas, the parties were distinctly recognized as Khoja Muslims in the preamble and references were made to precedents specific to that community. Here no such references were made, nor did any of the three judges refer to Hindu law or Hindu legal precedents modified by Khoja custom or recognized as pertaining to the Khoja community. Instead, the decisions were based solely on English precedent. It is also remarkable that no subsequent cases refer to the decisions made in these judgements. Similarly, no secondary works concerning law in India refer to these cases as part of the corpus of law concerning the

⁵²It is interesting that he made no similar arrangements for any other future daughters-in-laws. Neither of his other sons were married at the time, but he appeared to assume that they would provide for their wives from their portion of the estate and their own earnings.

⁵³There is no question in my mind that this case was concerned with members of the Khoja community as a sentence in Karim Nensey's will specified "wedded wife of Khoja caste." This was a common way in which a parent could dictate, from beyond the grave, adherence to caste or sect customs and traditions. It was used to ensure that children married within the community, with forfeiture of their inheritance as penalty if they did not comply. Similarly the names of all parties to the suit were common amongst the Khoja community, although that, obviously, is not sufficient indication of their identity. 'Khoja' names, in combination with the above statement, are satisfactory proof to warrant my assertion that this was a Khoja case. *Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 617.

Khoja community.

It makes one wonder, then, that if other disputes concerning the Khojas had been determined according to Anglo-Indian law without reference to either the 1847 Khoja Female Inheritance, cases or Hindu law, as modified by Khoja custom, would the judgements have also been decided in favour of Khoja women's rights of inheritance? As this dispute occurred almost in a 'legal vacuum' as far as legal precedents regarding a Khoja woman's rights of inheritance were concerned, such speculation cannot go beyond this one instance. It is, however, remarkable that the only Khoja case which clearly defended a woman's right to both maintenance and to property, albeit through her son, made no mention of either Hindu law or of Khoja custom.

Khoja Inheritance Reviewed

It is significant that as more and more Khoja men made wills, and in their wills made provisions for their female family members, a shift away from the application of Hindu law began to take place in the courts. While it was an oft repeated legal joke that when alive, a Khoja was Muslim, but became Hindu on his death, the contradictory position with regards to gifts clearly showed the problems inherent in applying both laws to the community. Even written statements by Khoja men declaring that disputes should be decided according to Muslim law initially fell on deaf ears. By 1920, the Kutchi Memon community, which had been linked with the Khoja community in the 1847 Female Inheritance cases, received legislative recognition of their right to be covered by Muslim law if they made a declaration to that effect.⁵⁴ The Khoja community had no such legal option in matters pertaining to inheritance and succession, and it was only the efforts of two judges, B. Tyabji and Frank Beaman, that cut through the previous assumption that Hindu law *always* applied to the Khoja community in any and all matters pertaining to inheritance and succession.

As has been seen above, the ability to will away an entire estate, accorded by Hindu laws of testamentary powers, meant that a Khoja could make a gift of his or her entire estate. In the case of a Khoja woman gifting her entire estate to a male relation, as seen in the 1902 *Husenbhoy v. Ahmedbhoy* case, this right was upheld unconditionally. Significantly, it

⁵⁴This will be explored further in the next chapter.

was presumed that she had absolute possession of the property, not a life-estate interest -- an interesting irony as it had consistently and constantly been alleged by Khoja men, in cases concerning Khoja female inheritance, that a woman could only hold a life-estate interest in inherited property. The right to gift away an estate also meant that widows and dependant female relations were left vulnerable, as was attempted in 1906 in the case of *Mahomedbhai v. Fatmabai*, if the recipient of the gift was not disposed to support them adequately.⁵⁵

The 1904 *Moosabhai v. Yacoobhai* case was significant as it clearly challenged the application of Hindu law to the Khoja community in matters of gifts. Justice Tybaji's judgement was the legal opinion that predominated thereafter.⁵⁶ For example, the issue of *wakfs* and gifts outlined in a Khoja will was decided according to Muslim law in 1911 by Justice Beaman in *Cassamally Jairajbhai Peerbhai v. Sir Currimbhoy Ebrahim*.⁵⁷ The more general question of whether Khoja wills were governed by Hindu or Muslim law was raised in a 1912 case, *Hassonally v. Popatlal*.⁵⁸ Judge Beaman, in his decision, noted that it had "never yet been authoritatively and finally decided that for all testamentary purposes a Khoja Mahomedan is to be treated as though he were a Hindu governed by the Hindu Law."⁵⁹ Beaman argued, instead, that the "opinion appears to have rested chiefly upon the assent of counsel of long standing and experience" and that he had

never been able to regard it as an authoritative and final decision of ... a question so important and so vitally affecting the interests of a large, wealthy, and influential community could hardly be properly decided upon the admissions of counsel made probably for their own convenience in the argument of a particular case.⁶⁰

Beaman, thus, based his decision not on Hindu law, but general principals.⁶¹ Finally, in

⁵⁵Although technically the 1906 *Mahomedbhai v. Fatmabai* dispute concerned a sale deed executed during a death-bed illness, the court treated the deed as a gift, given the circumstances.

⁵⁶By 1929, it was simply assumed that in matters of gifts and *wakfs*, Khojas were governed by Muslim law. Dongerkery, *The Law Applicable to Khojas and Cutchi Memons*, 5.

⁵⁷The issue of *wakfs* was determined in *Cassamally Jairajbhai Peerbhai v. Sir Currimbhoy Ibrahim* (1911) 36 *Indian Law Reports, Bombay Series*, 214. For a brief discussion of the cultural and legal context of the case, see: Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press, 1985), 71-3, 151-3.

⁵⁸*Hassonally v. Popatlal* (1912) 14 *Bombay Law Reporter* 782. This case came before Justice Beaman and was decided June 25, 1912 on the Original Civil side. The case concerned a gift (*hiba*) by will.

⁵⁹*Hassonally v. Popatlal* (1912) 14 *Bombay Law Reporter* 787.

⁶⁰*Hassonally v. Popatlal* (1912) 14 *Bombay Law Reporter* 787.

1920, the *Abdul Karim v. Karmali* judgement clarified that a Khoja was not a 'Hindu' within the meaning of the Hindu Wills Act, 1870.⁶²

The legal opinion that Khojas were governed by Hindu law in all matters connected with inheritance was, thus, gradually being eroded in related issues such as gifts. These decisions, though, did not materially benefit Khoja women and were often made, instead, in the context of upholding Khoja men's rights to property. With the exception of the one case, *Mahomedbhai v. Fatmabai*, which was determined without reference to either Hindu law or Hindu law modified by Khoja custom, no other cases came before the courts which upheld a Khoja woman's right to inherit property. The gender bias against the rights of Khoja daughters and widows to inherit property absolutely was not challenged or overturned, even as wills and gifts were eventually determined largely according to Muslim law. If the courts initially had trouble determining which law to apply to Khoja disputes over gifts, it was very clear on the application of Muslim law in matters pertaining to marriage and divorce.

Divorce and Maintenance

An entirely different problem was introduced when a dispute arose over Khoja marriage, divorce and maintenance. These were particularly thorny issues as there was considerable contradiction between the court application of Hindu law to Khojas in matters of succession and inheritance on the one hand, and an assumption that Muslim law applied in all other matters of personal law. Hence, women were caught between being denied rights to property under Hindu law, yet equally vulnerable to being denied other rights under Hindu law, such as maintenance, because they were Muslim.

In re Kasam Pirbhai and his wife Hirbai, 1871

In re Kasam Pirbhai and his wife Hirbai was a dispute between a Khoja husband and

⁶¹He referred to an earlier case which related to this issue in which he outlined his legal position in this matter. The case, unfortunately, was not available for this study but can be found in: *Pestonji v. Framji* (1910) 12 *Bombay Law Reporter* 683.

⁶²*Abdul Karim v. Karmali* (1920) 22 *Bombay Law Reporter* 708. The judgement was heard by Crump on March 12, 1920 on the Original Civil side. A Khoja woman, Mariambai, agreed to sell a piece of land, however, before the deed of sale was finalized, she passed away and questions arose as to the validity of the agreed upon sale. It was determined that regardless of whether the testamentary powers of Khojas were the equivalent of Hindus, they were not Hindu and therefore were not governed by the Hindu Wills Act, 1870. The decision made in *Hassonally v. Popatlal* was acknowledged.

wife over the validity of their divorce and the woman's right to maintenance from her husband.⁶³ The case was decided in the Bombay High Court on July 21, 1871 by Sir Michael Westropp and Bayley.⁶⁴ Cumruddin Tyabji⁶⁵ provided counsel for Kasam Pirbhai. Hirbai was represented by G. S. Lynch, Acting Attorney for Paupers.⁶⁶ Also Anstey, with Mayhew, argued in support of Kasam Pirbhai and Green for Hirbai.⁶⁷

The case particulars were as follows. Kasam Pirbhai and Hirbai, both Khoja Muslims, were married to each other in the Sunni form of marriage before the Kazi of Bombay in 1849. At the time, all Khojas generally validated their marriages in such a way, whether they followed the Aga Khan or the *barbhai* reform faction. The marriage was not happy and six months later, Hirbai went to live with her mother. Kasam Pirbhai applied to the *jama'at* for permission to marry a second wife. Before leave was granted, the *jama'at* ordered Pirbhai's father to make an arrangement for the maintenance of Hirbai.⁶⁸ Two years after the second marriage was solemnized, Hirbai returned to her husband, lived with him and became pregnant. Disagreements arose between them and Hirbai again left her husband to live with her mother. She applied to the *jama'at* for maintenance, which was granted. Pirbhai argued

⁶³ *In re Kasam Pirbhai and his wife Hirbai* (1871) 8 Bombay High Court Reports 95.

⁶⁴ Likely this was Sir Lyttleton Holyoake Bayley. He was first a barrister for many years before becoming Advocate General, and finally a judge. He was characterized as "a strong, capable and experienced judge" but also "not much liked by practitioners" nor "apparently... in the good books of Government either." On the retirement of Sargent in 1895, he was acting Chief Justice and the logical next choice for the position on a permanent basis. When Farran, his junior, was appointed over him, Bayley immediately resigned. Although likely not a factor in the decision, Bayley supported such legislative Acts as the Ilbert Bill. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 73, 75.

⁶⁵ Camruddin Tyabji, brother of Budruddin Tyabji, qualified as the first Indian solicitor enrolled in England in 1858. At that time, there was a compulsory oath in which a solicitor vowed "to conform on the faith of a true Christian." As Camruddin was a Muslim, he would not utter the oath and this dead lock came before Lord Chief Justice Campbell. Campbell, with two other English Judges, determined that the part of the oath by which one swore to uphold Christianity "was not essential and might be dispensed with in the case of non-Christians." Vaccha, Famous Judges, Lawyers and Cases of Bombay, 15. For a fascinating essay on the Tyabji clan, see Theodore P. Wright, Jr. "Muslim Kinship and Modernization: The Tyabji Clan of Bombay" in Family Kinship and Marriage among Muslims in India, 217-238, Imtiaz Ahmad, ed., (New Delhi: Manohar, 1976).

⁶⁶ For Hirbai to qualify for an Attorney for Paupers, it is logical to assume that she was in dire financial straits.

⁶⁷ It is unclear from report of the case whether these arguments were put forward in the October 3, 1870 rule *nisi* directed to John Connon, Senior Magistrate of the Police, or if they were again heard by Westropp in this appeal. It is entirely possible, though, that Westropp merely considered the earlier written arguments, affidavits and testimony as sufficient and did not re-investigate the issues or evidence previously provided.

⁶⁸ The arrangement was recorded in the *jama'at khana* books.

that the maintenance was for his daughter, and paid it to his wife for approximately 18 years, until March 1870. At this point, Hirbai went before the Senior Magistrate of Bombay for an order directing her husband to maintain her. The Magistrate granted her order and directed Pirbhai to pay Rs. 25 per month for her maintenance. Five months later, Pirbhai unilaterally divorced his wife and offered to return her *mohar*, dower. She refused, not acknowledging the validity of the divorce since it was obtained without her consent.⁶⁹

In the case, Hirbai argued that a Khoja custom existed which required a wife's consent before she could be divorced. The issue of whether she also had the right to maintenance after being validly divorced from her husband was ignored by the courts, as the case specifically pertained to the Magistrate's earlier order alone. Although not mentioned specifically, it was noted in other places that for Hindu women, maintenance must be provided until a woman remarried, or was proven to be unchaste. It appears that Hirbai made the assumption that this would be equally valid in her case.

Green argued that Hirbai's husband could not, by divorcing her, absolve himself of any responsibilities towards her maintenance. He stated that a Magistrate can only reduce the amount of maintenance. To do otherwise would "admit a husband's power thus to evade an order for maintenance" which would "render the salutary provisions of the Act [XLVIII of 1860] mere nullity in the case of Muhammadans."⁷⁰ Equally, Green argued that the husband could not abrogate his responsibility to his wife, *as per* general Khoja customs, by seceding from the general community. Green proved that in the general Khoja community (those who followed the Aga Khan) there was a custom by which a husband could not divorce his wife without her consent. He further asserted that the divorce was not valid without the approval of the *jama'at* to which the parties originally belonged, particularly as the wife still was a member of that community. Green, therefore, argued both that the divorce was invalid and that Kasam Pirbhai was obligated to maintain his wife.

By contrast, Kasam Pirbhai's counsel argued that the Sunni Khoja *jama'at*, to which the husband belonged, required only that a man divorce his wife according to Sunni law and have this validated by the Sunni Khoja *jama'at*. Once he returned the wife's dower, her *mohar*, and paid maintenance during the three month period of *idat*, he was under no

⁶⁹*In re Kasam Pirbhai and his wife Hirbai* (1871) 8 Bombay High Court Reports, 95-6.

⁷⁰*In re Kasam Pirbhai and his wife Hirbai* (1871) 8 Bombay High Court Reports, 98.

obligation to support her or provide her with maintenance in future, and all ties between them would be severed.

Pirbhai's counsel, Anstey, also argued that irrespective of the sect to which a Muslim man belonged, he had the right to unilaterally divorce his wife. In support of this, Anstey quoted the work of a German, Nicholas von Jornaauw, as an authority:⁷¹ "The declaration of divorce is wholly in the will or caprice of the husband, and he is not bound to disclose the causes which move him hereto. As to the wife the divorce is unconditionally obligatory on her."⁷² Similarly, earlier cases were referred to in which it was determined that marriage between a Sunni man and Shi'a wife was valid, and also that a man had a right to change his sect. Hence European interpretations of Muslim law and the colonial court precedents were considered the binding authority on the parties, not the representations of their own leaders, whether the Aga Khan or Sunni *mullas* or *kazis*, nor their community decision making bodies.

It was further established that Kasam Pirbhai had been a member of the reformist Sunni Khoja faction for twenty five years. Eight instances were given in which Sunni Khoja men divorced their wives according to Sunni law and registered their divorces in the *Kazi's* court. As the Sunni faction had seceded from the larger Aga Khani Khoja community, none resorted to the Aga Khani *jama'at khana* for validation of their actions. It was noted that Kasam Pirbhai and other Sunni Khojas like him were excommunicated by the Aga Khani Khoja community -- thus having no such recourse even had they wanted to validate their divorce before the entire community.⁷³

While the lower courts supported the wife's right to maintenance, the Bombay High court saw fit to accept the Sunni Khoja stance and deny her any right of maintenance, validating the divorce made without her consent. Equally damning was the assumption that the husband's religion or sect was binding on both spouses, irrespective of the wife's beliefs. This case clearly went across factional lines, and one wonders if any other divorces by Sunni

⁷¹I have not found other references to Jornaauw in secondary sources on Muslim law. Nor was he cited in other Muslim cases examined here, hence his position as an "authority" was dubious beyond that vested in him by Anstey in this case.

⁷²*In re Kasam Pirbhai and his wife Hirbai* (1871) 8 Bombay High Court Reports, 98.

⁷³*In re Kasam Pirbhai and his wife Hirbai* (1871) 8 Bombay High Court Reports, 99.

Khoja men were from Aga Khani Isma'ili Shi'a wives. It also did not even consider the impact or implications for Khoja women. It was likely that Hirbai was destitute, the sum in question was quite paltry, and yet the court deemed that the strict interpretation of Sunni law must be applied in this case, and then, by precedent, to any others concerning the Khoja Sunni community. As will be seen in the next case, it was not a stretch to then apply such a denial of a divorced woman's right to maintenance by her Sunni Khoja husband to Shi'a Khojas as well.

Suleman Varsi v. Sakinabai, 1899

This was precisely what occurred in *Suleman Varsi v. Sakinabai*.⁷⁴ The precedent established in the case of a Sunni Khoja husband in *Kasam Pirbhai v. Hirbai* was applied to Shi'a Khoja Muslims as well. The case came before Justice H. J. Parsons⁷⁵ and Justice M. G. Ranade⁷⁶ on June 14, 1899, on appeal from the the Criminal side of the Court for Zanzibar. The couple belonged to a Khoja Shi'a sub-sect which had split off from the majority of the *jama'at*.⁷⁷ Prior to the divorce, Sakinabai applied for maintenance under Section 488 of the Criminal Procedure Code.⁷⁸ It is presumed that the couple had separated at this point. The Court directed Suleman Varsi to pay his wife Rs. 30 per month as maintenance.

⁷⁴*In re Suleman Varsi v. Sakinabai* (1899) 1 Bombay Law Reporter 346.

⁷⁵Henry James Parsons was born in 1845 and educated at Eton and Lincoln College, Oxford. He was known for being fair, sound, independent, clear-headed and sympathetic towards Indians. He was one of the rare early I.C.S. judges who "earned the affection and confidence of the public and of the profession." Parsons was normally teamed with Ranade on the Criminal Bench and together they commanded "exceptional [public] confidence." Of the two, Parsons was deemed to be "generally more liberal and sympathetic towards the defence than his Indian colleague." Vaccha, Famous Judges, Lawyers and Cases of Bombay, 63, 78-9.

⁷⁶Mahadeo Govind Ranade was born in 1842 and was educated at Kolhapur and Elphinstone College Bombay. He graduated with an M.A. in 1865 along with Bal Mangesh Wagle. He and Wagle took their L.L. B. in 1866 and enrolled as advocates in the High Court in 1869. However, he didn't practise law and instead joined government service. He was a Presidency Magistrate, judge of the court of Small Causes and sub-judge, before he was raised to the Bench of the High Court in 1892. Ranade was also a social reformer and a scholar, and wrote on Indian history, particularly Maharashtra. Ranade passed away in 1901. Vaccha, Famous Judges, Lawyers and Cases of Bombay, 83-4, 113 and Mitter, Indian Judges, 65-96.

⁷⁷They were Subhania Khoja Muslims, which as a whole seceded from the Bhagat community after their marriage. These sub-communities are not explained in the Bombay Gazetteer or other secondary sources. It appears from the case that they were originally part of the larger community, hence an assumption that they were part of the Aga Khani Isma'ili Shi'a Muslim community and splintered off with one of the Ithna 'Ashari factions.

⁷⁸The connection between this case and the more recent, and infamous, Shah Bano controversy is evident.

On January 6, 1898, Suleman Varsi divorced his wife by *talak*, witnessed by their 'priest' and members of the Subhania *jama'at*. A written record was also made of the divorce. Varsi offered to pay Sakinabai maintenance from the date of the earlier court order, October 28, 1897, to the date of divorce, but categorically refused to pay any maintenance in future.⁷⁹ Sakinabai again sued Varsi for maintenance, which the Assistant Judge granted, with the limitation that it be only until the date of the court order, October 3, 1898.

Varsi applied to the Bombay High Court to reverse this order of maintenance. The High Court held that the divorce was valid, as it was obtained with the consent of the *jama'at* to which the parties seceded and that there was no need to obtain the consent of the *jama'at* from which they had left. The judges therefore determined that as the divorce was valid, the ex-husband was under no obligation to maintain Sakinabai past the official date of divorce.⁸⁰

Both of these cases provide examples of how decisions by the lower courts in favour of supporting female parties were overturned in the Bombay High Court. The cases also demonstrated the selectivity of the court's position *vis-a-vis* the Khoja community in the application of Hindu or Muslim law. The Bombay High Court, similarly, saw no need to uphold decisions made by Khojas under the guidance of the *jama'at*. Here also, arrangements made which were more in favour of women, or attempted to provide some sort of protection for Khoja women, were overturned in the higher courts, even though they had been recognized as valid by a Magistrate.

Restitution of Conjugal Rights: *Meherally v. Sakerkhanoobai*, 1905

An entirely different twist on the problem of marital disagreements was rendered in *Meherally v. Sakerkhanoobai*.⁸¹ What was most remarkable about the case was the manner in which the couple made arrangements between themselves in the *jama'at khana*, prior to coming before the court. As in *Suleman Varsi v. Sakinabai*, the Khoja wife, Sakerkhanoobai, did not quietly accept male domination. She first sought recourse within the

⁷⁹It appears that Varsi did not meet his earlier obligation to pay maintenance to Sakinabai. One can also construe that Varsi's motivation for divorce was partially to rid himself of any obligations to maintain Sakinabai.

⁸⁰*In re Suleman Varsi v. Sakinabai* (1899) 1 Bombay Law Reporter 346-7.

⁸¹*Meherally v. Sakerkhanoobai* (1905) 7 Bombay Law Reporter 602.

jama'at, which was generally sympathetic to her plight, then before the Magistrate and finally the High Court. *Meherally v. Sakerkhanoobai* was decided by Justice Batchelor on July 18, 1905 on the Original Civil side. M. A. Jinnah⁸² and F. S. Talyarkhan were counsel for the plaintiff. Meherally Mooraj, with Ghamat and Jaffer Rahimtoola, were counsel for the defendant, Sakerkhanoobai.

The plaintiff sued the court for restitution of conjugal rights with his estranged wife, Sakerkhanoobai. The ruling involved determining whether an earlier agreement made between the couple was valid, as it provided for subsequent separation. It was further alleged that the agreement had been obtained under undue influence, as Meherally at that time faced police charges for his assault on Sakerkhanoobai's brother.⁸³

The agreement made in this case between the couple under the direction of the *jama'at* was highly remarkable for several reasons.⁸⁴ The husband agreed to rent a house of his wife's choice where they would live separately from his mother and relations to see if they could live together harmoniously. If, for any reason, his wife could not live contentedly with him, she was at liberty to live separately from him and Meherally agreed to pay Rs 20 per month for her expenses. He further agreed that specified ornaments were hers alone, he had no right to them and she could do with them as she wished. Meherally also apologized for earlier accusing her of stealing her own ornaments and retracted the complaint he had made to the police. She was also entitled to her clothing which he promised to return to her. Sakerkhanoobai was free to receive visits from her friends and relations at any time. She was

⁸²Jinnah, the famous "father of Pakistan" was a Khoja, born in Karachi in 1875 or 1876. His father was a lower-middle class small hide-merchant. Jinnah later openly declared himself to be an Ithan 'Ashari Shi'a Muslim, not an Aga Khani Isma'ili. As a barrister, he had an active and strenuous practice. From 1912 to 1940, he was in demand for his "forcible and fearless advocacy." He was reputed to have a "forensic manner... very clear-headed and he drove home his points both on law and facts with a lucid and persistent eloquence." Vaccha, *Famous Judges, Lawyers and Cases of Bombay*, 149-51. S. P. Sen, ed., *Dictionary of National Biography II (E-L)* (Calcutta: Institute of Historical Studies, 1973), 240-6. Jinnah's political career requires no introduction and numerous biographies discuss his involvement with the independence movement and the formation of Pakistan.

⁸³The couple were married in 1901, but had problems from the beginning. After six to seven months of cohabitation, Sakerkhanoobai left to live with her mother, Jetbai, and brother, Alaudin. She was pregnant at the time and gave birth in July 1902 to a daughter. The daughter died five months later and it was after the funeral for their child that Meherally assaulted his brother-in-law, Alaudin. Sakerkhanoobai had earlier made complaints to the *jama'at* regarding her situation, but little was done until the assault. Sakerkhanoobai's brother filed a case against her husband in the Magistrate's Court and it was while this prosecution was pending that the *jama'at* was able to bring about the written agreement by Meherally.

⁸⁴The agreement was called Exhibit A and was made on February 3, 1903.

equally free to go and visit with her friends and relatives. “[W]hen you desire so to do,” Meherally agreed, “...I should not raise any objections as regards both the matters.”⁸⁵ Significantly, Meherally also agreed never to divorce his wife and thus leave her vulnerable to being without maintenance.⁸⁶ The *jama’at* thus tried to negate the more pernicious aspects of decisions made by the colonial courts in order to protect the rights and interests of the woman involved in the dispute.

Meherally’s plea that he made the agreement under undue influence was deemed a misrepresentation of the situation. Even Meherally’s own witnesses stated that he had “signed it gladly,” and, at the time, felt he was “making a fair bargain and compromise as things stood then.”⁸⁷ However, the court immediately questioned the validity of such an agreement, both under English and Muslim law, and declined to take account of rules specific to the Khoja community. Instead, it insisted that the agreement made between the couple under the direction of the *jama’at* was null and void under both English and Muslim law.⁸⁸ The judgement ruled in the plaintiff’s favour, ordering restitution of conjugal rights. It was further added that the husband owed his wife a sum of Rs. 500 as dower, out of which she must bear all her costs in the suit and half of his.⁸⁹

Restitution of conjugal rights was a peculiar example of Anglo-Indian law in action. The grafting of a legal point totally foreign to the Indian sub-continent took on such a strong judicial life of its own that it continued to be enforced in India long after it was discredited in England.⁹⁰ The practice of allowing such suits for restitution of conjugal rights was rendered “almost inoperative” in England when the legal penalties, such as imprisonment and seizure of property, were denied by the Matrimonial Causes Act of 1884.⁹¹ In India,

⁸⁵ *Meherally v. Sakerkhanoobai* (1905) 7 Bombay Law Reporter 604.

⁸⁶ *Meherally v. Sakerkhanoobai* (1905) 7 Bombay Law Reporter 604.

⁸⁷ *Meherally v. Sakerkhanoobai* (1905) 7 Bombay Law Reporter 603-4.

⁸⁸ *Meherally v. Sakerkhanoobai* (1905) 7 Bombay Law Reporter 606-7.

⁸⁹ *Meherally v. Sakerkhanoobai* (1905) 7 Bombay Law Reporter 610.

⁹⁰ For overviews of restitution for conjugal rights in England, see: Lee Holcombe, Wives and Property: Reform of the Married Women’s Property Law in Nineteenth-Century England (Toronto: University of Toronto Press, 1983), 32-3, 44, 95, 98, 99, 105, and Mary Lyndon Shanley, Feminism, Marriage, and the Law in Victorian England, 1850-1895 (Princeton: Princeton University Press, 1989), 3, 158, 177-83, 184.

⁹¹ The Matrimonial Causes Act, Stat. 47 and 48 Vict, c 68 of August 1884 removed the penal provisions of the law regarding restitution of conjugal rights. The courts in England could no longer threaten imprisonment or attachment of property of a spouse who disregarded the court’s directive to resume cohabitation. Instead, the party would be only guilty of desertion, which could become grounds for an

however, suits for restitution of conjugal rights continued unabated well into the twentieth century.⁹² Only one case in 1885, *Dadaji Bhikaji v. Rukhmabai*, challenged the applicability of this law, by arguing that restitution for conjugal rights had been transplanted to India with no foundation in Hindu law.⁹³ The decision by Judge Pinhey in that case proved so controversial that it was eventually set aside.⁹⁴ The ultimate irony was that later judges felt that they “unhappily, had no alternative” but to “administer the Hindoo laws” regarding restitution of conjugal rights!⁹⁵ This position was maintained despite Pinhey having categorically proved that restitution suits did not lie in Hindu law, and the colonial courts were guilty of applying a discredited English law.⁹⁶ If ever an issue clearly illustrated the paradoxical position of the colonial courts, *vis-a-vis* Indian women, this was it -- a law which was no longer valid in England, and not in any sense a native law or custom, became so entrenched in the colonial courts that British and Indian judges felt compelled to uphold it.

Maintenance or Divorce?

A related issue of maintenance was that of Khoja widows. Although in previous Khoja cases women did succeed to property, this was in the absence of close male relations. When a deceased Khoja left male relations who inherited the estate, what were their obligations to support the widow? This question demonstrated the challenge faced by Khoja women. If Hindu laws were applied, they did not have the right to inherit a portion of their spouse's estate. Were they still assured of the right to maintenance under Hindu law? Such was the state of law in the Khoja community that men wishing to absolve themselves of unwanted

immediate judicial separation (as opposed to the normal two year waiting period) and eventually divorce. The Matrimonial Causes Act was introduced in 1857 and amended several times thereafter: 1859, 1878, 1884, 1907, 1923, 1937, 1960, 1963, 1973. See Holcombe, *Wives and Property*, 105, 257-8.

⁹²For example, see: *Bai Jivi v. Narsing Lalbhai* (1927) 29 *Bombay Law Reporter* 332. Restitution of conjugal rights was also applied in the case heard in Bombay of a Russian Christian woman married in France to an Indian Parsi man. *Dalal v. Dalal* (1930) 32 *Bombay Law Reporter* 1046.

⁹³*Dadaji Bhikaji v. Rukhmabai* (1885) 9 *Indian Law Reports, Bombay Series* 529. Chandra provides an excellent introduction to the case and the most salient related issues in: Sudhir Chandra, “Whose Laws?: Notes on a legitimising myth of the colonial Indian state” *Studies in History, N.S.* 8, 2 (1992), 187-211.

⁹⁴Chandra deconstructs the furor and debate surrounding the decision in: Sudhir Chandra, “Rukhmabai: Debate Over Woman's Right to Her Person” *Economic and Political Weekly* 31, 44 (November 2, 1996), 2937-47.

⁹⁵ Chandra, “Rukhmabai”, 2946.

⁹⁶ Chandra, “Rukhmabai”, 2946.

responsibilities felt confident to take cases before the courts which denied even a widow's right to maintenance.

Rashid v. Sherbanoo, 1904

One of the more extreme challenges made with the intent of undermining a woman's legal position was in the case of *Rashid v. Sherbanoo*.⁹⁷ Naser Karmali was a Khoja Muslim merchant of Zanzibar. He married Sherbanoo according to Ithna 'Ashari Shi'a rites and at this time wrote a contract which stated that, in case of any dispute, the couple were to be governed by Muslim law.⁹⁸ Naser died January 20, 1903 leaving his widow Sherbanoo, who was still a minor, and two brothers, Ismail and Rashid Karmali. Rashid alleged that as Khojas married according to Muslim rites, requirements for maintenance of widows under Hindu law need not apply. The outrageous aspect of this case was that while a widow's Hindu right to maintenance was allegedly denied according to Muslim law, so too was a woman's Muslim right to inherit a portion of her husband's estate!

Naser Karmali executed a deed of sale on May 10, 1901⁹⁹ that sold to his brother, Ismail Karmali, all of Naser's share of the property which they had inherited jointly from their father. The deed stipulated a sale price of Rs. 5,000 for property valued at over Rs. 35,000. The price vastly undervalued the property in question, and the reason given by Naser Karmali was: "I have no children" and regard "you as my child."¹⁰⁰

The case was heard by Russell and Chandavarkar and decided September 15, 1904. S. V. Bhandarkar, with M. M. Karbhari, were counsel for the appellants, Rashid and Ismail Karmali. No one appeared for the respondent, Sherbanoo, hence she was without legal counsel. The first issue was a determination of which laws should be applied to the parties. The next issue was whether the deed of sale made by Naser Karmali was valid, and, if so, what were the consequences. Another question raised was whether Hindu widow's rights to maintenance even applied, given that the couple married according to Muslim rites.

⁹⁷*Rashid v. Sherbanoo* (1904) 6 Bombay Law Reporter 874. Also reported as: *Rashid Karmali v. Sherbanoo* (1904) 29 Indian Law Reports, Bombay Series 85. The case was the first appeal No. 54 of 1904, from the decision of Skinner Turner, Esq., Assistant Judge of His Britannic Majesty's Court at Zanzibar, in civil suit No. 336 of 1903.

⁹⁸The *Shari'a* was specifically mentioned. *Rashid v. Sherbanoo* (1904) 6 Bombay Law Reporter 874.

⁹⁹20th Vaisakh 1957.

¹⁰⁰*Rashid v. Sherbanoo* (1904) 6 Bombay Law Reporter 875.

Irrespective of the contract made at the time of marriage, and the statement in the will left by Naser that the balance of his property was to be divided according to Shi'a Ithna 'Ashari laws, the court accepted that:

Although a Khoja may be married according to the Mahomedan rites, yet at the moment of his death so far as regards the succession to his property he is a Hindu. The living Mahomedan, by operation of law, becomes a dead Hindu.¹⁰¹

Had Muslim law been applied, in accordance with Naser's will, then the widow had a right to inherit a portion of the estate -- Rs. 5,000 if the deed was held valid, Rs. 35,000, if not. According to the judge, Hindu law applied here, and thus, the widow had no right to a portion of her husband's estate, regardless of the validity of the deed of sale.

The question then turned to what rights the widow possessed in such circumstances. The husband's brother Rashid alleged that the widow had no right to maintenance. In the absence of counsel for the widow, the judge referred to Mayne¹⁰² to suggest that it would be "a manifest injustice to the widow of a deceased Khoja or Mahomedan as he might on the one hand deprive her of her right of inheritance under Mahomedan law and her right to maintenance under the Hindu law."¹⁰³ He noted that the Khojas were governed by Hindu law for the purposes of succession and inheritance. Hence, when a Khoja man inherited the estate of a deceased, he did so with all the rights and liabilities annexed to it, such as maintenance.¹⁰⁴ The judge ruled that if a Khoja had "any brothers living joint with him, his wife will on his death be entitled to maintenance out of his estate while his property devolves on them."¹⁰⁵ Based on this conclusion, the judge ruled against Rashid and Ismail Karmali and supported the widow's right to maintenance. Out of an estate worth at least Rs. 35,000, an amount of Rs. 35 per month was deemed appropriate maintenance for her.¹⁰⁶

¹⁰¹*Rashid v. Sherbanoo* (1904) 6 Bombay Law Reporter 874.

¹⁰²The judgement referred to Mayne, p. 592, s. 458, 6th ed. Although the spelling provided was Mayne, it may have been a reference to one of Sir Henry Maine's works on Hindu and Muslim law.

¹⁰³*Rashid v. Sherbanoo* (1904) 6 Bombay Law Reporter 878.

¹⁰⁴The judge literally stated: "Maintenance of those whom the deceased was bound to maintain and payment of his debts were liabilities which were annexed to the estate in the hands of those who take it." *Rashid v. Sherbanoo* (1904) 6 Bombay Law Reporter

¹⁰⁵*Rashid v. Sherbanoo* (1904) 6 Bombay Law Reporter 874.

¹⁰⁶*Rashid v. Sherbanoo* (1904) 6 Bombay Law Reporter 877-8. One wonders how no maintenance was a recognized as a manifest injustice, but Rs. 35 was considered just.

Rashid Karmali applied for a review of the 1904 *Rashid v. Sherbanoo* case as he argued that there was a mistaken view of the law and that Sherbanoo had been, in fact, divorced by her husband before his death. As a divorced Khoja Muslim woman, she was not entitled to any maintenance. In the review petition, heard by Russell and Chandavarkar on April 7, 1905, the judges made a remarkably fair decree, which recognized the limited resources of Sherbanoo. They ruled that the “defendants must pay to the plaintiff any costs incurred by her in the appeal or in the review and must furnish security for her further costs to the extent of Rs. 1,000 to be justified in this Court.”¹⁰⁷

While the appeal was being considered by the court, Rashid and Ismail Karmali were charged with instigating certain persons to give false evidence for the purpose of establishing that their brother, Naser Karmali, had divorced his wife Sherbanoo. This case, *Emperor v. Rashid*¹⁰⁸ was considered January 10, 1907 before Judge Batty and Mr. Justice Heaton.¹⁰⁹ For the divorce of Sherbanoo to Karmali’s brother to be valid, there needed to be four witnesses at each of the three utterances of *talak*¹¹⁰ Karmali and Ismail were accused of inducing several witnesses to give false evidence as to being present when Naser gave *talak*.¹¹¹ In the face of overwhelming evidence, they were tried and convicted of soliciting others to bear false witness by exerting financial and other pressure.

The *Rashid v. Sherbanoo* appeal case was decided by Justice Batty and Mr. Justice Pratt on January 23, 1907.¹¹² The decision did not take into account the previous evidence of

¹⁰⁷*Rashid v. Sherbanoo* (1907) 9 Bombay Law Reporter 252.

¹⁰⁸*Emperor v. Rashid* (1907) 9 Bombay Law Reporter 212; *Rashid v. Sherbanoo* (1907) 9 Bombay Law Reporter 252.

¹⁰⁹The case, *Emperor v. Rashid* was heard in the Bombay High Court as Criminal Appeals Nos. 150 and 151 of 1906, from convictions and sentences. The issues were: “Criminal Procedure Code (Act V of 1898), Sec. 190, 195, 478; Indian Penal Code (Act XLV of 1860), Sec 193; whether witnesses gave false depositions; their prosecution for perjury; trial of the accused for perjury by the District Magistrate; sanction, practice and evidence before the Magistrate; findings of the original trial upheld.” *Emperor v. Rashid* (1907) 9 Bombay Law Reporter 212.

¹¹⁰Apparently there were insufficient witnesses at each utterance of *talak*, and at one, both the nurses and priests could not understand the language. *Emperor v. Rashid* (1907) 9 Bombay Law Reporter 216.

¹¹¹One witness, Mahomed Dhala, was in debt to Rashid Karmali and was offered an interest free loan of Rs. 100 to give false evidence. When he was not paid, he complained before the court. Similarly, Abbas Ebrahim testified that he agreed to say before the court that in his presence “Nasur divorced his wife in the French Hospital.” *Emperor v. Rashid* (1907) 9 Bombay Law Reporter 216. These were not the only allegations of instigating others to give false evidence regarding this matter. A pattern was established whereby indebtedness was used to induce collusion of witnesses to testify that declarations of *talak* took place.

¹¹²The case was heard on the Appellate Civil side, appeal no. 54 of 1904 on appeal from the decision of Skinner Turner, Esq., Assistant Judge of His Britannic Majesty’s Court at Zanzibar in Civil Suit No. 336 of

perjury and influence. Instead, it determined the judgement purely on the basis of the state of health of Sherbanoo's husband during the three incidents at which he was alleged to have said *talak*. The court found that the deceased suffered from a terminal illness and was unable to attend to ordinary avocations, thus a divorce made under these circumstances was called into question.¹¹³ It was also noted that the deceased had already executed his will and transferred his property to his brother Ismail, evidently in anticipation of near death. It was also decided that since the deceased passed away during the three month period of alleged *idat*, the widow should not be deprived of the right to inherit, and the appeal was dismissed.¹¹⁴ Although it was determined that the widow was not deprived of her right to *inherit* a portion of the estate, the wording of the judgement revealed legal confusion since the applicability of Muslim law in this context was not raised. Instead, it was presumed that the brother was obligated to pay the maintenance outlined in the previous decision, not provide the widow with her portion of the estate under Muslim law.

In these cases, the villainy of the brothers-in-law was so apparent that the court found legal justification to ensure that the widow had a right to maintenance. At the time of the first case, Sherbanoo was a minor and did not appear to have any recourse other than maintenance for survival. She was young, in what must have been a hostile environment on the death of her husband, and no mention was made of any male relations on her side supporting or assisting her in her fight. Naser's stance also appears ambiguous: while he explicitly indicated that disputes should be decided according to Muslim law, he made a sale deed of his entire estate, akin to a 'gift,' in line with Hindu law. The deed of sale was, perhaps, intended to get around the restriction on a Muslim's ability to 'gift' away more than one third of his or her estate, yet given the duplicity of his brothers over the alleged divorce of Sherbanoo, the entire manner within which the whole situation developed is questionable. What is pertinent is how the courts, in the end, chose to uphold a Khoja widow's Hindu right of maintenance. This

1903. The issues considered were: the application Muslim law; divorce by *talak*; and the validity of declarations made during a *Murz-ul-maut*, that is, a death-bed illness. *Rashid v. Sherbanoo* (1907) 9 Bombay Law Reporter 252.

¹¹³The doctor provided evidence that the deceased was not curable and dying of consumption. The doctor further testified that Naser was sent away from the Hospital so that he could die at home.

¹¹⁴This was justified as being in accordance with the restrictions placed on a death-illness' declarations or *marz-ul-maut*. *Rashid v. Sherbanoo* (1907) 9 Bombay Law Reporter 254.

was the precedent gleaned from both the 1904 and 1907 judgements for future cases.

Maintenance of Khoja Widows

The entire issue of maintenance, as seen in the above cases, indicates the weakness of Khoja women's status in their society and at large. While a considerable number of Khoja women worked alongside their menfolk, many more were completely dependent financially on their male relations: be it father, husband or son. This follows the Hindu tradition of female financial dependence, in accordance with the 'law of Manu.' Avenues to move outside of this, as Muslims, were denied, first according to Khoja 'custom,' and then entrenched in the courts in a manner evidently more restrictive than previous practice in the community. The issue of direct monetary maintenance became crucial for the economic survival of widows who could not count on either living with, or being indirectly maintained by, their husband's male relations.

Poor or inadequate maintenance for widows was far from uncommon. Ahmedbhoy Habibbhoy, a prominent reform member, gave testimony in *Hirbai v. Gorbai* which was quite telling. One example he cited was Cassumbhoy Nathoobhoy, who left an estate worth 5 lakh rupees, but only made provisions for a paltry Rs. 25 per month for his widow. A different witness, Rahimbhoy Lalljee, gave another example of the *jama'at* fixing a widow's maintenance at Rs. 7 per month while the estate was valued at around Rs. 50,000. However, the widow also lived with the brother and was consulted on the management of the estate.¹¹⁵ Another witness cited an instance around 1870 in which the father took the property of his deceased son, who left two widows. One widow objected, and the *jama'at* forced the widow to return all her ornaments to the father in exchange for his maintaining her. He did so, but at the absurdly low level of only Rs. 6 per month.¹¹⁶

There were many other instances of small or insufficient arrangements for maintenance for widows, while only a few cases where a widow received a generous monthly stipend.¹¹⁷

¹¹⁵Testimony of Rahimbhoy Lalljee in SRO, JD 1880, 31, *H v. G* Hearing, 62.

¹¹⁶The widow who was forced to return all her jewelry had been living separately -- had she sold all the ornaments, she may have earned more per month from the interest of the capital than she received as maintenance. The other widow was apparently living with the father. Testimony of Dunjeebhoy Ragoo and Allarukia Soomar, in SRO, JD 1880, 31, *H v. G* Hearing, 31 and 43.

¹¹⁷One witness spoke of a situation in which a widow was given a generous settlement, in lieu of maintenance. Goolam Hoosain Dhunjee died, leaving no children and a widow. No mention was made of any

One brother, Fazulbhoy, of the Khoja Reform party leader, Ahmedbhoy Habibbhoy, provided maintenance for his widow at a significant monthly sum of Rs. 500 out of an estate worth somewhere between 1 1/2 lakh to 2 lakh Rupees. By contrast, Ahmebhoy Habibbhoy's other brother, Khan Mahomed Hubibbhoy, left Rs. 109 per month to his widow while his daughter and her children received Rs. 1,000.¹¹⁸ These two instances were far from the norm, and more often than not, widows received meager maintenance at best.

In this context, most witnesses acknowledged that, as a result, widows often married again.¹¹⁹ One witness went so far as to assert that Khoja widows "constantly" remarried.¹²⁰ What is not explicitly conceded is that this may very well have been a result of economic necessity. Cases were even cited in which a mother remarried. In one instance, the mother had inherited property from her son. She relinquished the property to her son's heirs prior to solemnizing her new marriage.¹²¹

Remarriage introduces another issue. Women who did remarry were expected, according to most witnesses, to give up all property belonging to their previous husband, including ornaments and clothing. One witness explained:

Widows can remarry, on marriage they retain nothing which belonged to their husbands. They cannot marry without giving up all ornaments and clothes, and other property belonging to her husband. The Jamat does not give permission. The man who is going to marry [a widow] comes to the Jamat, and says he is going to marry a widow -- they then send for the widow, and tell her to give up the property of her late husband, and if a marriage takes place without permission of the Jamat, they are excommunicated.¹²²

Even when a woman controlled the estate, cases were given where a widow remarried within

brothers, and his father took control of Dhunjee's property. Dhunjee's father paid Dhunjee's widow a lump sum of Rs. 20,000, and it was assumed that she could make no further claims of maintenance. The testator, Ebrahim Dama, did not know if the widow and father lived jointly or separately. Testimony of Ebrahim Dama in SRO, JD 1880, 31, *H v. G Hearing*, 22.

¹¹⁸The estate was managed by Alladin Premjee. Testimony of Ahmedbhoy Habibbhoy in SRO, JD 1880, 31, *H v. G Hearing*, 18.

¹¹⁹Amedbhoy Habibbhoy used the word "sometimes", however, sufficient other examples made my use of the adjective "often" justified. Testimony of Ahmedbhoy Habibbhoy in SRO, JD 1880, 31, *H v. G Hearing*, 16.

¹²⁰Testimony of Alladin Premjee in SRO, JD 1880, 31, *H v. G Hearing*, 19.

¹²¹Testimony of Allurakhia Soomar in SRO, JD 1880, 31, *H v. G Hearing*, 46. This was affirmed by the *Kamaria*. Testimony of Khakee Puddumsey in SRO, JD 1880, 31, *H v. G Hearing*, 51.

¹²²Testimony of Dunjeebhoy Ragoo in SRO, JD 1880, 31, *H v. G Hearing*, 30.

a few years at most. The expectation that the widow's ornaments belonged to her husband's estate was applied equally, regardless of whether it was a man or a woman who managed the estate. In one case, the mother-in-law managed the property, but the widow had to return ornaments worth around Rs. 4,000 before she remarried.¹²³

These examples were merely the 'tip of the iceberg' and, as other authors have suggested, a Hindu widow's maintenance and chastity were significant arenas for control by their male relations and enforced in a patriarchal colonial court system.¹²⁴ The consequences of unchastity for either a wife or a widow was forfeiture of any right to maintenance. This was a familiar theme in Hindu law and cropped up before the Bombay High Court on numerous occasions.¹²⁵ A man could allege that his wife or the widow of his male relation was unchaste, and he would be completely absolved of all responsibilities towards her maintenance or that of her children. The application of these rules to Khoja widows was upheld in the courts. Hence, Khoja widows often remarried, whether due to inadequate maintenance, her own desire, or other factors. While efforts to support widow remarriage were a hot topic for Hindu social reformers in India in the late nineteenth and early twentieth century, Khoja women struggled to assert rights by which they had the *option* to avoid remarriage if they wished.

Conclusion

The provision of maintenance in Hindu law was understood to be equal to a Muslim

¹²³Testimony of Khimjee Rowjee in SRO, JD 1880, 31, *H v. G* Hearing, 67.

¹²⁴Delores F. Chew, "The Case of the 'Unchaste' Widow: Constructing Gender in 19th-Century Bengal" *RFR/DRF* (special issue on Colonialism, Imperialism and Gender) 22, 3/4 (Fall/Winter 1993): 31-40 and Sandra Rogers, "Hindu Widows and Property in Late Nineteenth Century Bombay" in Class, Ideology and Women in Asian Societies, Gail Pearson and Lenore Manderson, eds., (Hong Kong: Asian Research Service, 1987), 47-64. For an exploration of this theme in modern India, see the section on Moral Regulation of Women in and through the Family in Chapter Two, "Women, Legal Regulation and Familial Ideology" in Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India (New Delhi: Sage Publications, 1996), 99-132.

¹²⁵Some cases which illustrate this include: *Parami v. Mahadevi* (1910) 12 Bombay Law Reporter 196; *Bhikubai v. Hariba* (1924) 26 Bombay Law Reporter, 13; *In re Fulchand Maganlal* (1928) 30 Bombay Law Reporter 79; *Kisanji Mohanlal Seth v. Lakshmi* (1931) 33 Bombay Law Reporter 510; *Lakshmi Chand v. Anandi* (1935) 37 Bombay Law Reporter 849. The only exception was if a wife's unchastity was condoned by the husband. In such a case, a widow could not be denied maintenance or succession to her husband's property on the grounds that she was unchaste during her marriage. *Gangadhar v. Yellu* (1911) 13 Bombay Law Reporter 1038.

woman's right to inherit property. While many in the colonial courts acknowledged that Muslim women's inheritance rights placed them in a slightly better position than their Hindu counterparts, it was also admitted that mere existence of such a legal state did not ensure that women actually had independent control of their property.¹²⁶ These rights were not necessarily exercised, and, simply because a Muslim woman possessed the right to inherit a portion of her father's, husband's or son's property, did not necessarily mean she did so.

Khoja women were particularly vulnerable in matters of divorce, as a man who wished to avoid his responsibilities to maintain an estranged wife could divorce her unilaterally, without her knowledge or consent. After the return of her dower and acknowledgement of his divorce before whatever faction to which he belonged, he was completely absolved of any responsibilities for his former wife's welfare. The *jama'at khana* attempted to mitigate this iniquitous possibility, as was demonstrated in a compromise agreement in which a Khoja husband agreed to never unilaterally divorce his wife and leave her vulnerable to abandonment with no means of support.¹²⁷ The colonial courts, however, defended a Khoja Muslim man's right to unilaterally divorce his wife and rendered such arrangements null and void -- as was demonstrated in *In re Kasam Pirbhai and his wife Hirbai, Suleman Varsi v. Sakinabai* and *Meherally v. Sakerbhanoo*.¹²⁸

It appears that Khoja women had the more iniquitous aspects of Hindu and Muslim law applied to them. The use of Khoja 'custom' was often alleged to undermine their rights, including one attempt (*Rashid v. Sherbanoo*) to deny both a right to inherit a portion of a husband's estate under Muslim law, as well as a denial of a widow's right to maintenance under Hindu law.

As was demonstrated in *Advocate General v. Karmally, Moosabhai v. Yacoobhai*, and *Mahomedbhai v. Fatmabai*, some Khoja men, out of special concern for female family members, began to use wills to stipulate specific annuities, gifts or shares, for their daughters, daughters-in-law, and widows. As the courts, and specifically Justices Tyabji and Beaman,

¹²⁶For an example of such a comparison of Hindu and Muslim law in colonial court cases of the nineteenth century, see: Krishnalal Mohanlal Jhaveri "Pardah Ladies" *Bombay Law Reporter* 4 (1902), 76-95. Also in the same volume, "Hindu Law, 1901" *Bombay Law Reporter* 4 (1902), 176-86.

¹²⁷*Meherally v. Sakerkhanoo* (1905) 7 *Bombay Law Reporter* 604.

¹²⁸In the *Meherally v. Sakerkhanoo* case the court explicitly negated the *jama'at*'s arrangement between the spouses, and upheld a Khoja Muslim man's right to divorce.

began to recognize a shift in the construction of Khoja wills from Hindu to Muslim usages, a more liberal interpretation of Khoja women's rights of inheritance began to emerge. It also paved the way for later legislation, which brought the entire community under the governance of Muslim law with the 1937 Shariat Act.

The 1847 Khoja Female Inheritance case opened the door to creating a practice which denied a Muslim daughter's right to inherit property. This denial was the first step in both defining and recognizing other limitations on women's rights to inherit property, manage estates, and so forth in the colonial courts. As the legal status for Khoja women in intestate succession became increasingly restricted under a modified Hindu law rigidly applied, she was also subject to the equally rigid application of Muslim law in matters of marriage and divorce. In these issues, no modification of Muslim law, in recognition of specific Khoja customs, was permitted. As will be shown in the conclusion, the 1847 decision, extended and modified by subsequent decisions regarding the Khoja community, led to similar judgements for other Muslim communities. The negative implications for the general rights of Muslim women in Western India were quite considerable.

Chapter Six

A Law for the Khojas?

Chapter Six A LAW FOR THE KHOJAS?

Introduction

British judges grew impatient and frustrated with the myriad of issues pertaining to Khoja inheritance and succession.¹ This led to an aborted attempt during the years 1878-1885 to create a specific Khoja Bill to govern such matters. The debates and government response during this process revealed a highly patriarchal and conservative understanding of Khoja women's rights of inheritance. When efforts at codification failed, the courts continued to apply Hindu law in some situations, Muslim law in others, as was demonstrated in the previous chapter. Yet all were aware of the proposed Bill with its highly restricted notions of women's rights. It was no coincidence, therefore, that Khojas had begun to specify in detail their wishes for the disposition of their estates by will. The courts eventually recognized that Khojas were writing wills in a manner more consistent with Muslim law, and started to apply Muslim law in the construction of gifts by will. There were limitations on this, however, and there was no way to ensure that Hindu law would not be applied, even if a will specifically stated that disputes were to be resolved using Muslim law. By contrast, the Kutchi Memons pressed for, and won, recognition of their right to declare themselves governed by Muslim law in 1920. This paved the way for the decision to have *all* Muslims, including sects like the Khojas, governed by Muslim law with the 1937 Shariat Act.

Law Commission 1878 - 1886

Given the confusing nature of Hindu law as it was applied to the Khojas, it was not surprising that some jurists favoured the development of a special code applicable to the Khoja community, as had been done for the Parsis. A Parsi Law Commission was appointed and recommended that a separate law be enacted for the entire Parsi community.² As a result of

¹Litigation was not simply concerned with Khoja women's inheritance, but also a range of other issues pertaining to partition, male and female maintenance, divorce and so forth, some of which were explored in the previous chapters.

²M. P. Jain, Outlines of Indian Legal History 3rd ed., (Bombay: N. M. Tripathi, 1972), 560-1. Jesse S. Palsetia, in his PhD dissertation provides an exhaustive overview of the Parsis community's legal status in India from 1787-1918, including the various Commissions and Acts developed to govern the community. Jesse S. Palsetia, "A Social History of the Parsis: Preservation of Identity in Bombay City, 1787-1918" (PhD diss., University of Toronto, 1996).

the Commission's efforts, the Parsi Intestate Succession Act was passed in 1865.³ Jurists involved in Khoja cases urged that the Government consider duplicating the process used for the Parsis. In 1875, Sargent was one of the first judges to propose this.

It is manifest that such a state of the law must greatly encourage litigation, and we cannot help thinking that it would be most desirable that the Government should take steps, as was done in the case of the Parsis, to ascertain the views of the majority of the community of the subject of succession, and should then pass an enactment, giving effect to those views.⁴

Sargent readily admitted that it would be impossible to have any unanimity regarding such an enactment, as the religious differences, conflicts and resulting schisms divided the Khoja community into several factions. However, he was confident these difficulties were not "insuperable" and that "the rules which were found generally to prevail might be made law."⁵ Westropp echoed this sentiment, and in the same year encouraged government action on the state of Khoja inheritance and the law.⁶

Such urgings by judges like Sargent, echoed by Westropp and others, led to Government interest in the formation of a special Khoja Law Commission to investigate the whole issue of Khoja inheritance and succession. The proposed appointment of a Commission coincided with a suggestion to extend the 1870 Hindu Wills Act XXI to the interior of the Bombay Presidency.⁷ Justice Melvill, considered for the position of President of the proposed Commission, was consulted early on in the process. Melvill urged that before a Commission was constituted, the Aga Khan should be approached by the Government of India to first "ascertain the wishes of the community."⁸ Only then, Melvill suggested,

³It was followed soon thereafter by a Parsi Marriage and Divorce Act, Act XV of 1865.

⁴*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 322.

⁵*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 322.

⁶Abstract of the Proceedings of the Council of the Governor-General of India, 1884, xxii. 149 referred to in Dobbin, Urban Leadership in Western India, 120, fn 6.

⁷Memo No. 216, dated January 14, 1880 from the Government of Bombay to the Secretary to the Government of India. NAI, Home, JD October 1881, Proceeding 249-250, Index n.a., 150. The process of 'codification' was a hall mark of colonial legal changes which took place in the latter part of the nineteenth and early twentieth century. For an overview of the various Law Commissions, development of codes and their enactments, see: M. Rama Jois, Legal and Constitutional History of India (Bombay: N. M. Tripathi, 1990), 62-99; and George Claus Rankin, Background to Indian Law (Cambridge: Cambridge University Press, 1946), 59-76, 135-60.

⁸The opinion of Melvill, who had been on the Committee for the Parsi Law Commission, was

should the Government “call upon the heads of the Suni party for an expression of the views of their part of the Community.”⁹ Melvill further recommended that a Khoja Law Commission should only be convened with the purpose of creating legislation for the Khojas if, and only if, both parties appeared to be largely in agreement.¹⁰ To do otherwise, Melvill concluded, would make the entire Commission a “most thankless and unprofitable task.”¹¹

To this end, Sir Richard Temple wrote the Aga Khan I.¹² The Aga Khan replied that he was convinced that “a settled law of succession among us would work injuriously to our Community” and urged the Government to abandon such plans to change the existing system.¹³ This was countered by a petition from the Sunni Khoja faction, dated October 22, 1878, which noted that their group would be pleased to draft rules for their section of the community and supported the proposed Commission.¹⁴ Ahmedbhai Habibbhai, leader of the Sunni Khojas, had earlier wrote to Sir Michael Westropp suggesting that the proposed enactment would

confer a great boon on the community, in as much as the want of such beneficial legislation is deeply felt by large portion of the community, and the supply of that want, though not properly appreciated now, is sure to be considered as a blessing ultimately.¹⁵

This was precisely what the Government wished to hear, and plans for the proposed Khoja Law Commission proceeded.

March 4, 1879, a Commission was appointed to prepare a draft or project of law for

solicited. After explaining the process used for the Parsis, he expressed considerable doubt as to the efficacy of setting up a Commission. Memo from Melvill, dated September 11, 1878 in SRO, JD 1878, 35, 60-74.

⁹Memo from Melvill, dated September 11, 1878 in SRO, JD 1878, 35, 60-74.

¹⁰Memo from Melvill, dated September 11, 1878 in SRO, JD 1878, 36, 60-74.

¹¹Melvill was being considered to preside over the proposed Khoja Law Commission. In a private letter addressed to C. Gonne, attached to his official memo, Melvill wrote: “The long and the short of it is that it would be useless to attempt to impose upon the Khojas any Bill of succession...” Letter from Melvill, dated September 11, 1878 in SRO, JD 1878, 36, 53-9.

¹²Letter no. 3525 of 1878, dated June 14, 1878, from C. Gonne, Acting Chief Secretary to Government, to His Highness, Aga Khan Mehlattee in SRO, JD 1878, 36, 84-7.

¹³The letter of the Aga Khan, dated September 24, 1878 was dated September 4, 1878. SRO, JD 1878, 36, 82-3. The Aga Khani Shi'a Khoja petition was addressed to Sir Richard Temple, dated September 4, 1878. SRO, JD 1878, 36, 92-5, signatures from 96-103.

¹⁴Mentioned by C. Gonne as a petition from Ahmedbhoy Habibhoy and 176 other members of the Khoja Sunni *jama'at*, dated October 22, 1878. SRO, JD 1878, 36, 78-81.

¹⁵Letter by Ahmedabhoy Habibhoy, addressed to Westropp, dated October 14, 1878 in SRO, JD 1878, 36, 104-13.

regulating succession to intestate property in the community.¹⁶ Justice Melvill was appointed President, the Aga Khan's son, Agha Ali Shah, represented his interests, Ahmedbhai Hubibbhai represented the Sunni Khoja *jama'at*. Two other members, Jairaj Pirbhoy and Rahimtula Sayani,¹⁷ were perceived by the Government to represent the "more moderate section of the Shias"¹⁸ The Aga Khan voiced objections to the composition of the Committee, stating that the individuals presumed to represent the moderate section of the Shi'a Khojas were actually part of the Sunni faction headed by Ahmedbhai Hubibbhai.¹⁹ Of the two, Pirbhai had very strong Sunni Khoja ties and eventually rejoined the Sunni faction, while Sayani agreed with the Reformers on some issues, but predominantly held an independent line. As a result of the Aga Khan's objections, Dhurumsey Poonjabhoy, an Aga Khani Shi'a Khoja, and Mr. N. Spencer, Acting First Judge of the Court of Small Causes, were added to the Committee.²⁰

The Debates

The discourse in these debates over the proposed Bill for regulating succession and inheritance amongst members of the Khoja Community was decidedly male. Though 'women' as a construct played the focal role in the arguments between the various factions and

¹⁶Letter No. 1287 of March 4, 1879 from J. Nugent, Acting Secretary to the Government of Bombay, Judicial Department to the Officiating Secretary to the Government of India. NAI, JD March 1880, Proceeding 124, Index 18, 124.

¹⁷Rahimatulla Muhammad Sayani was born in 1847 and held the position of honorary Magistrate for several years. He was also President of the Municipal Corporation, Member of the Legislative Councils of Bombay and the Governor General and presided over the twelfth National Congress. He died June 6, 1902. C. E. Buckland *Dictionary of India Biography* (1905; Varanasi: Indological Book House, 1971), 376. See also Christine Dobbin, *Urban Leadership in Western India* (Oxford: Oxford University Press, 1972), 38, 116, 119, 139, 168-9, 178, 181-2, 216, 231-2, 235, 241.

¹⁸NAI, HRAP, JD March 1880, Proceeding 130, Index 25, 12.

¹⁹Letter dated May 9, 1879, from the Aga Khan to the Secretary to the Government of Bombay, Judicial Department in which the Aga Khan alleged that Jairaj Pirbhoy and Rahimtula Sayani were previously members of the Sunni Khoja reform faction, though currently identified themselves as Shi'a. Of the two, Jairaj Pirbhai later firmly identified himself as a Sunni Khoja. Sayani, however, later led the way for a third voice: liberal reform-minded, supportive of women's rights, yet questioned the wholesale acceptance of the Aga Khan I's position. His views were later reflected in the social reform leadership taken by Aga Khan III. NAI, Home, JD March 1880, Proceeding 131, Index 27, Appendix C.

²⁰The Aga Khan had requested two Aga Khani Shi'a Khojas or one Shi'a Khoja and one European. Letter No. 216 of January 14, 1880 from J. R. Naylor, Acting Chief Secretary to the Government of Bombay to the Secretary to the Government of India, Legislative Department. NAI, JD March 1880, Proceeding 15-130, Index 20, 12.

government levels, they had no direct voice in the debate at all.²¹ The contradiction of the Sunni Khoja faction, which represented itself as 'reformist,' yet in the same breath argued that women were a 'superstitious' lot and could not be trusted with any rights of property, seems to a modern reader an untenable stance. Yet, to these men, it was entirely consistent with their position. They felt that the Aga Khan was a 'backward' influence, hence, efforts to curtail his influence must be 'forward' looking and 'reformist' in nature. The assumption was that the women in the Khoja community, regardless of the faction to which their menfolk belonged, were under the sway and influence of the Aga Khan. What does not appear to have occurred to the Reformist men was that the Aga Khan supported women's rights of inheritance in theory, and certainly as understood under Shi'a law. It also appears that he was always available to his female constituents, and that through him, women in the community may have found a voice for their interests, or at least a sympathetic ear.

Ahmedbhai Hubibbhai, as leader of the Sunni Khoja faction, outlined the faction's views regarding Khoja women in a letter to C. G. N. Macpherson, dated August 29, 1885. He stated that:

Khoja females are for the most part illiterate, prone to superstition, and liable to be very easily imposed upon. If they are constituted absolute owners of moveable property... there is every probability that they would waste it away. We may mention that there have been instances within our knowledge in which Khoja females have wasted away property come to their hands, and specially moveable property in making superstitious donations, notwithstanding the existence of near heirs...²²

It was understood that the donations were made to the Aga Khan, however, no evidence was provided to support these "instances."

The Sunni Khoja faction, therefore, argued largely in favour of the Bill, as it was predominantly a reflection of their interests. Each draft restricted more and more the rights of women to inherit property, and the way in which she could potentially use any property which did come to her. Such restrictions were vociferously petitioned for by the the Sunni Khoja members²³ of the Commission, and backed by the Sunni Khoja community, as necessary to

²¹There was no structure, organization or forum for Khoja women to voice their opinions or represent their interests at this time. Although women could bring issues to the *jama'at khana*, they were not considered part of the community decision-making body, which was all male. If women made depositions, they were not recognized as such in the memorandums before the Khoja Law Commission.

²²SRO, JD 1885, 25, 235-9.

prevent helpless, ignorant and illiterate women from being 'misguided' and 'persuaded' into making 'foolish' and 'wasteful' use of their property. Beneath this rhetoric was a concern, sometimes even explicitly articulated, that women would bequeath substantial portions of any property to the Aga Khan, and 'ignore' the 'rights' of the men who 'should rightfully inherit' upon her death.²⁴

The Aga Khani Khoja faction also appeared content to sacrifice a great deal of women's inheritance rights, though concerns were voiced. For example, the Aga Khani faction strenuously supported a widow's and mother's right to inherit and manage property, and that these rights not be limited to a life-estate interest only, as proposed by the Sunni Khoja faction. While certainly more sympathetic to women's rights to inherit property, what emerges from the petitions and letters to Government was less a concern about women's rights to inherit property as women's issues *per se*, than a power struggle over who had the right to determine the laws and customs of the community.²⁵ Objections were raised on the grounds that the Sunni and Shi'a Khojas held different customs, and hence a Bill appropriate for the Sunni Khoja community would not be appropriate for the Shi'as. It was felt that the draft Bill formulated by the Commission was heavily influenced by Sunni concerns and, if made into law without substantial changes, would be an intolerable imposition on Shi'a customs, conventions, and practices. This was best summed up in a petition, dated October 12, 1882, submitted on behalf of the Bombay Shi'a *jama'at khana* by the *Mukhi* and *Kamaria*. In their petition, it was asserted that:

It is a well known fact that Sunni Khojas have always been at variance with the

²³For simplicities sake, I have included the Shi'a Khojas reformer Commission members with the Sunni Khoja member. One Shi'a Khoja, Sayani, as will be seen later, did not always agree with the Sunni faction either, though they were united in their opposition to unquestioned allegiance to the Aga Khan.

²⁴Spencer noted the Sunni Khoja position regarding Khoja women and the Aga Khan as: "having regard to the superstitious character of females generally, and the great influence which the Aga exercised over the females of his sect, thought it would lead to gifts being made to him by devout females, to the detriment of the members of the family." Letter by N. Spencer to Secretary to Government, Judicial Department, dated August 16, 1885 in SRO, JD 1885, 25, 231.

²⁵The allegation that the Commission was biased was constantly raised by the Aga Khani party. It was argued that as Ahmedbhoy Habibhoy was a Sunni Khoja and Pirbhoy and Sayani were partisans of the Sunni Khoja faction, the Bill did not represent the views "of the majority of the Khoja community, but the views of the majority of the members of the said Commission." Letter, dated October 12, 1882, from Sadukhbia Haja, *Mukhi*, and Mahomedbhai Choth, *Kamaria*, to Sir James Ferguson, Governor and President in Council, Bombay. NAI, Home, JD May 1883, Proceeding 232, Index 130.

Shia Ismaeli Khojas, and have at times manifested the most rancorous feelings towards them. It is also a recognized fact that the Sunni Khojas and the Shia Ismaeli Khojas are governed by their own special customs, and this being so, any attempt to tie them together by one set of laws cannot but prove abortive... In previous petitions [the Shi'a Khoja *jama'at*] tried to show that the proposed enactment would, instead of doing any good be destructive of their social happiness... [T]he decisions of the Jamat which were based upon such customs were always regarded and acquiesced in as being just and equitable, until the evil Genius of Sunniism which made its way amongst the community of your Excellency's humble petitioners since 20 years past, perverted their minds and set them at defiance to the authority of that sacred body. [The proposed Bill and sections pertaining to limiting a widow and mother's right of inheritance to life-estate only] is totally opposed to their ancient customs and... entirely an innovation.²⁶

The newly converted Ithna 'Ashari Shi'a Khoja faction also argued that they were even more distinct than the other two factions and could not under any circumstances be covered under the proposed Bill. This group took the position that they were covered under Muslim Personal law pertaining to Ithna 'Ashari Shi'as in India. Their interest in separating themselves from the majority of the community was even more pronounced than the Sunni faction with regards to the Bill. One then assumes that in their case, these converts must have accepted women's rights of inheritance, though there is no specific evidence proving that Shi'a laws of inheritance and succession were, in fact, practised by the community. Even Ishvani, who provides such poetic insight into this community, is silent on this issue.²⁷ Similarly, little evidence can be found to support any assertion that there were different practices among the various factions, but only different philosophical and ideological positions.

The concerns of the various levels of Government were slightly different, yet also more in tune with that of the Sunni reformist faction than that of the majority of Khojas who followed the Aga Khan. There was a growing feeling that the position of the Aga Khan was already too strong, and that he could prove meddlesome in the affairs of the Empire. As later demonstrated by the Aga Khan III's role in the Muslim League, the concern was not unwarranted. As a result, it was also in the Government's interest to curtail any further powers of the Aga Khan by whatever minor means at their disposal. After having made the

²⁶Letter, dated October 12, 1882 from Sadukhbhai Haja, *Mukhi*, and Mahomedbhai Choth, *Kamaria*, to Sir James Ferguson, Governor and President in Council, Bombay. NAI, Home, JD May 1883, Proceeding 232, Index 130.

²⁷Ishvani, *Girl in Bombay* (London: Pilot Press Ltd., 1947).

unprecedented 1866 decision in the Bombay High Court that all Khoja Community property was the personal property of the Aga Khan, the colonial administration was limited in the sanctions and restrictions they could place on the Aga Khan as they pertained to the Khoja community. Yet it was argued, in various government memorandums, that the Bill should be passed in such a way as to substantially restrict a woman's right to dispose of her property, as otherwise it would likely go to the Aga Khan.

Even under Hindu Mitakshara law, the restrictions on a woman's right of inheritance was already curtailed substantially. A woman could only inherit if four generations of males were absent, and then only as a limited estate. In one of the later drafts of the Commission, a Khoja woman could only inherit if *seven* generations of males were absent, and any property which a woman did inherit was only as a life-interest estate. It was her responsibility to pass the property on to the next generation without having disposed of it or lessening its value in any way. The only way a woman could dispose of any inherited estate was to pay off debts -- particularly if the debt was to Government. While it is doubtful that the actual affect of any donation or bequeath made by a Khoja woman to the Aga Khan would have been of sufficient size to have made much of a difference when compared with the enormous wealth the Aga Khan already possessed, the fear of such anticipated donations became a focal point of debate, and the excuse for proposing to restrict a woman's inheritance rights far beyond that even found in Hindu law.²⁸

²⁸Although the evidence provided in the earlier 1875 *Hirbai v. Gorbai* case suggested that most women did not, in fact, give their property to the Aga Khan, it is interesting to note how the issue was explained by the witnesses. One witness stated that a widow could not give away any property if there were relations within three to four generations. However, she could give a portion to charity, and "I consider giving to the Aga Khan as giving charity." However, he had never personally heard of a woman giving away her property, or property in her possession from her husband, to the Aga Khan. Testimony of Lalljee Ludha in *H v. G*, SRO, JD 1880, vol. 31, Hearing, 58. The possibility of this occurring was increased if a proposal was passed by which the property of a Khoja, dying intestate with no immediate heir, would go to the *jama'at*. Although this custom was always previously practiced and all members of the Khoja community appeared to have accepted this, several individuals in the Government felt such property rightfully belonged to the Government to dispose of as it saw fit. One official argued that "The change would, however, compel, or might compel, Khojas to yield to social and religious pressure, and to register their wish to make His Highness Aga Khan their heir." Another memo to the Legislative Department noted that "If as the Khojas coolly propose, we give up the right of the state to escheats of the assets of these wealthy sectaries, we introduce a dangerous precedent, and one of which other sects of Natives will certainly seek to avail themselves." The remote possibility that the Government would have gained any significant assets and thereby prevent the Aga Khan from gaining the property, led to numerous memos back and forth. Only one memo noted that "the numbers are comparatively insignificant; and that on financial grounds the questions in the case considered above, of the surrendering of the Government's ultimate right of succession, is not one of great

While it would appear that such a debate was more about the power struggles between the factions than actual concern with women's rights of inheritance, the chosen battle ground demonstrated a number of assumptions made by all parties concerning Khoja women, and women in general. Their ignorance, illiteracy, and general backwardness was emphasized, particularly by the Reformist faction. Only R. M. Sayani, a non-Aga Khani Shi'a member of the Khoja Law Commission and important Muslim politician, appears to have challenged these assumptions, arguing that the men in the community were no better than the women, and that gender was no bar to stupidity!²⁹

The Outcome

The Khoja Law Commission was explicitly based on the previous Parsi Law Commission, however in reverse. The Parsi Commission was set up in response to urgings from the community. The Khoja Commission was set up at the urgings of the judiciary and at the behest of Government. Even before the Commission drafted its first Bill, Melvill was both astute and prescient in his 1878 observation that:

with the whole field of Hindu law, Mahomedan law, usage and custom, presented to them [the Khoja community] as a debating ground, I see no chance of bringing them [the different factions] to anything like an agreement. Every question will be fought out not on its merits, but as a party question... Finally, the Commission would feel that, if it wished to accomplish anything at all, it would have no choice but simply to give effect to Agha Khan's wishes. If a Code were prepared, which was opposed to those wishes, Agha Khan would merely have to signify his disapprobation, and all the Jumats in country (with a single exception [the Bombay Sunni Khoja *jama'at*]) would send in petitions to the legislature, protesting that they had never desired any legislation at all, and that of all possible legislation that proposed by the Commission would be the most unsuited to their Community.³⁰

This was precisely what transpired.

As a result, the various factions appeared more interested in using debates over legal

importance." NAI, Home, JD, October 1881, Proceeding 249-250, pp. 6, 18, and 19, respectively.

²⁹In one of his letters to Macpherson, Under Secretary to the Government of Bombay, Judicial Department, R. M. Sayani wrote: "... it must be remembered that even men do not always make the best use of their rights over property and the most effective way of preventing the apprehended mischief and teaching women as well as men to make good use of their rights over property as of their other rights and privileges is to educate them." Dated from Poona, August 17, 1885 and contained in SRO, JD 1885, 25, 226.

³⁰Memo from Melvill, dated September 11, 1878 in SRO, JD 1878, 35, 60-74.

points as a way to voice their opposition to each other, rather than try to formulate a fair and realistic code to govern all Khojas in intestate succession and inheritance. The Aga Khan led the way for the majority of Khojas, with only a minority representation of the Commission. Ahmedbhai Habibbhai led the Sunni Khoja faction, which dominated the Commission numerically and appeared to have Government support. Additional representations were made by Shi'a Khojas who splintered off from the majority of Aga Khani Shi'as. Efforts at creating and approving the Bill stretched over nearly a decade, with vociferous debate and inconclusive results.

It should also be noted that in 1881, Aga Khan I passed away, leaving leadership of the Khojas with his son, Agha Ali. Agha Ali, Aga Khan II, despite ill health, continued to sit as a member in the Khoja Law Commission. When he passed away in 1885, the young Muhammad Shah, Aga Khan III, was represented by *Mukhi* and *Kamaria* of the Bombay Aga Khani Khoja *jama'at khana* and the lone Aga Khani Shi'a from the Khoja Law Commission, Dhurumsey Poonjabhoy, in the final debates regarding the proposed Bill.³¹ It was urged that the Government not pursue any legislation without accord from the Aga Khan and the majority of the Khoja community.

Although it was not possible to access the final Government papers on the Khoja Law Commission contained in the National Archives of India, by 1885 the entire process appeared to be at a stale mate.³² Even requests to obtain copies of the proposed Khoja Succession Bill, 1884 were ignored.³³ In court cases after 1885 concerning Khoja inheritance and succession, no mention was made of the proposed Bill and it is assumed that it was shelved some time in 1886, with only the briefest of Government notice in 1887.

What also emerges is that, while all the factions voiced concerns about women not one

³¹This was alluded to in a letter to C. G. W. Macpherson by Ladukbhai Hajee, *Mukhi*, and Mahomedbhai Chotti, *Kamaria*, dated October 7, 1885, in SRO, JD 1885, 25, 311-2.

³²The final files concerning the proposed Bill were all too brittle to be viewed or lost in the move to the National Archives of India's current location.

³³One Khoja, Abdulla Hajee Alahrakhia, wrote to the Judicial Department of the Government on Bombay on several occasions, trying to obtain copies of the Khoja Succession Bill 1884. He was never sent a copy and his request that a copy be forwarded in Urdu so that Khojas not conversant in the English language could also review the proposed Bill was ignored. An example of these requests are found in a letter by Abdulla Hajee Allahrakhia, dated March 7, 1885, sent to the Secretary to the Government of Bombay, Judicial Department, in SRO, JD 1885, 25, 5-6.

woman was directly consulted regarding her opinion on the issues. However, the ‘voices’ of women were present -- in the court cases held in the past between women regarding their interests, buried in the testamentary evidence of ‘leading men’ of the community regarding women of the community, a rare signatory to a petition, and by outside observers of the community. These women were far from the ignorant sheep depicted by Sunni Khojas. They were dynamic women who worked alongside their husbands outside of the home, who went about their business free from *purda* and other restraints. There were also a number who were literate and could hold their own with regards to education -- as contrasted with even several *Mukhis* and *Kamarias* of the community who were unable to even sign their own names in any language. Even in the inspirational literature, passed down from their *pirs*, women were present -- such as a revered author of *ginans*, known as Imam Begum.³⁴

Most importantly, contrary to the assumptions, these Khoja women were concerned enough about their affairs that they not only had wills drawn up, but also had them written in English. In these wills, they demonstrated a keen interest in what would happen to their property after their death and had strong ideas about how they wished it to be inherited and used. The women involved in the cases reviewed here expressed no intention of donating any property to the Aga Khan. For example, Rahimutbai, after fulfilling her duty to her family, retained a portion for the purpose of setting up a school and for providing such ‘Hindu’ grants as for the digging of a well for watering wandering sacred cows.³⁵ Granted, these few examples may not have been the norm of the community, as they were generally only women from wealthy families, yet they still provide a startling contrast to the image depicted by men -- Khoja and British -- in their petitions, letters and newspaper articles.

Had the proposed Khoja Bill been passed, it is highly unlikely that any of the Khoja women, noted in the above cases, would have been able to inherit or manage property. The women in the original 1847 Khoja Female Inheritance cases, both the widows and the daughters, would likely have been passed over in favour of much more distant male relations, or the Government would have taken possession of the estate. Certainly none of the women in Rahimbhai Allubhai’s family would have gained control over his estate -- as there were numerous distant male relations. While the Bill did not become law, awareness of the

³⁴G. Allana, *Ginans of Ismaili Pirs* (Karachi: Publishers United Karachi, 1984), 311-389.

³⁵*Gangbai v. Thavar Mulla* (1863) 1 *Bombay High Court Reports* 71.

proposed rules of inheritance was very high. Nearly all adult male Khojas in Bombay, at least, were signatories to one of the many petitions regarding the different drafts of the proposed Bill. Although the proposed Bill never became law, the issues articulated during the debates impacted on Khoja decisions regarding subsequent court cases. Those dissatisfied with the colonial court's understanding of Khoja inheritance sought to express their wishes by will, a practice previously rare except in the case of the very wealthy who were in direct contact with the British system of law through their trade or other activities.

Aftermath of the Law Commission

In the wake of the dissolution of the Khoja Law Commission, the Khoja community continued to be governed by an amalgam of Hindu law, Hindu law modified by Khoja custom, and Muslim law. It was clearly established in the case of the Khojas, as with other communities, that a convert to Islam was able to retain some portion of his or her original laws or customs. It was firmly accepted that Khojas were governed by Hindu law in matters of inheritance and succession. In *Rashid v. Sherbanoo*,³⁶ Judge Russell quipped that “[t]he living Mahomedan by operation of law became a dead Hindu.”³⁷ Fyzee called this an “inaccurate and misleading dictum” but it stuck and was oft repeated by later judges and authors on Hindu and Muslim law in India.³⁸ It was also accepted that Khojas were governed by Hindu law of joint family or partition, but in all other matters, such as marriage and divorce, by Muslim law.³⁹

One alternative to the rules contained in the proposed Bill would have been the addition of a particular clause by which individual Khojas could opt to have Muslim laws of inheritance applied in the disposition of their estate. Under this clause, those Khojas who wished to be governed by Muslim law, either Sunni or Ithna ‘Ashari, could have made a declaration to that effect. In the absence of formal regulations, some Khojas acted pragmatically to achieve their objectives. Just as Khojas were becoming more aware of the rules of Hindu law and the kinds

³⁶*Rashid v. Sherbanoo* (1904) 29 Indian Law Reports, Bombay Series 85, 89.

³⁷Asaf A. A. Fyzee, Outlines of Muhammadan Law, 2nd ed. (1949; Oxford: Oxford University Press, 1960), 56.

³⁸Fyzee, Outlines of Muhammadan Law, 57.

³⁹This position was clarified in: *Jan Mahomed v. Datu* (1913) 38 Indian Law Reports, Bombay Series 449.

of modifications to Hindu law that the Khoja community was governed by, so too were they becoming increasingly conversant with the rules of Muslim law. As was seen in the previous discussion of 'gifts' by will, Khojas could use the provision of annuities or gifts as a way to specify their wishes for the disposition of their estate. Wills, then, became the means to avoid the rigid application of Hindu rules of succession, modified by Khoja 'custom,' as determined by the colonial courts.

The application of Hindu law of inheritance and succession to the Khojas also led to its partial application to other communities, such as the Kutchi and Halai Memons, Sunni Bohras of Gujarat, and Molesalam Girasias of Broach.⁴⁰ The Kutchi Memons, specifically, were linked with the Khojas in the original 1847 Female Inheritance Cases by Perry. Their legal position was modified over time and considerable overlap existed between legal developments concerning the Khojas and Kutchi Memons. The Kutchi Memon community, however, followed through an idea of pursuing a legislated right to declare an individual and his or her family's observation of Islamic law. The Kutchi Memons were eventually able to change their legal position with the introduction of the Cutchi Memon Act XLVI of 1920.

Cutchi Memon Act

Under the Cutchi Memon Act XLVI of 1920⁴¹ and the Cutchi Memons (Amendment) Act of XXXIV of 1923, a Memon had the option to declare himself or herself governed in matters of succession and inheritance according to Muslim law.⁴² Any Memon who made such a declaration also made the application of Muslim law binding on his or her descendants as well. Less than ten years after the introduction of the Act, S. R. Dongerkery, asserted that "the majority of Cutchi Memons have already taken the benefit of the Act. Nevertheless, there must be some who have not done so for one reason or another."⁴³

This Act was repealed by the Cutchi Memons Act X of 1938 which stated that "all

⁴⁰Aqil Ahmad, Mohammadan Law 17th ed., (Allahabad: Central Law Agency, 1995): 44.

⁴¹The Act was published in the Bombay Law Reporter. "Act No. XLVI of 1920" (1920) 22 Bombay Law Reporter 150.

⁴²The Act provided a specific form for the declaration. A copy of this form can be found in S. R. Dongerkery, The Law Applicable to Khojas and Cutchi Memons (Bombay: n.p., c. 1929), 34-35.

⁴³Dongerkery, The Law Applicable to Khojas and Cutchi Memons, 32.

Cutchi Memons shall, in matters of succession and inheritance, be governed by Muhammadan law.”⁴⁴ It was further determined that this application of Muslim law to Memons was retroactive, hence binding on wills made prior to the enactment.⁴⁵ A couple of exceptions were permitted. A Kutchi Memon retained his or her ability to dispose of more than one-third of one’s property by will, without the consent of one’s heirs. As a result, a Memon retained ‘Hindu’ testamentary power, in contravention of Muslim law.⁴⁶ It was also decided that in disputes regarding agricultural land, Khoja custom or Hindu law applied, unless a Memon made a declaration in favour of applying Muslim law to him/herself and his/her descendants.⁴⁷ Related issues were clarified. Prior to the Shariat Act, if a Memon will contained a contingent bequest, it was void under Muslim law, but valid if the will was constructed by Hindu law. The Cutchi Memon Act, 1938 determined that all Kutchi Memon wills were to be constructed solely according to Muslim law.⁴⁸

Shariat Act, 1937

The Cutchi Memon Act of 1938 brought the Memon’s separate legal position completely in line with the changes introduced for such commercial communities with the Shariat Act of 1937. Under the new 1937 Act, all Muslims communities, including the Khojas, were covered by Muslim law, irrespective of their ‘customary’ practises which may have continued after their conversion to Islam. The Act stated that:

Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift of any other provision of Personal Law, marriage, dissolution of marriage, including *talak*, *ila*,⁴⁹ *zahir*,⁵⁰ *khula*⁵¹ and *mubaraat*,⁵²

⁴⁴Hidayatullah, Mulla Principles of Mahomedan Law, 17.

⁴⁵This was determined in: *Bayabai v. Bayabai* (1942) 44 Bombay Law Reporter 792.

⁴⁶Two cases established this prior to the 1937 Shariat Act and a third case upheld this position after the implementation of the Act. *Advocate General v. Karmali* (1903) 29 Indian Law Reports, Bombay Series, 133; *Advocate General v. Jimbabai* (1915) 41 Indian Law Reports, Bombay Series, 181. *Sattar Ismail v. Hamid Sait* (1944) 2 All India Reporter, Madras 504. Particularly Beaman’s remarks in *Advocate General v. Jimbabai* are pertinent to this discussion. Speculation on the impact of a declaration under the Cutchi Memon Act is found in: Dongerkery, The Law Applicable to Khojas and Cutchi Memons, 30-31.

⁴⁷Hidayatullah, Mulla Principles of Mahomedan Law, 17.

⁴⁸This decision was noted in *Ashraf Alli v. Mahomed Alli* (1946) 48 Bombay Law Reporter 642.

⁴⁹*Ila* gives a Muslim woman the right to demand a judicial divorce in the case of a vow by which the couple abstain from sexual intercourse for a period not less than four months. Hidayatullah, Mulla’s Principles

maintenance, dower, guardianship, gifts, trusts and trust properties and *wakfs* (other than charities and charitable institutions and charitable religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).⁵³

Hence the Act abolished the customary law of intestate succession of Khojas.

After the 1937 Shariat Act, all Muslim intestate succession fell under Muslim law. Both Kutchi Memons, as noted above, and Khojas kept the right to dispose of the whole of their property by will, thus retaining that aspect of Hindu law. Khojas could use this means to ensure that inheritance more closely followed Hindu patterns, if they so chose. This legal exemption from strict application of Muslim law was established in 1936 with the *Fidahusein v. Monghibai*⁵⁴ case and upheld a decade later in *Aliyarkhan v. Rambhau*.⁵⁵ If a Khoja wished to be governed by Muslim law in testamentary succession, he or she could make a declaration under the Shariat Act, Section 3 (1).⁵⁶ Although a Khoja could choose to restrict his or her testamentary power under the one-third rule of Muslim law, if such a declaration was not made, the construction of a Khoja will continued to be made according to Hindu law. However, questions relating to making or the revocation of a will, the validity of trusts and *wakfs* had to be validated according to Muslim law.⁵⁷ This was clarified in the 1946 case, *Ashrafalli Cassamalli v. Mahomedalli Rajaballi*.⁵⁸ Khojas, like Kutchi Memons, also

of Mahomedan Law, 265.

⁵⁰This is another form of Muslim divorce in which a husband compares his wife with any other female within a prohibited degree, ie. his mother. The husband must perform a penance, and until he does the wife has a right to refuse him. If the husband does not perform penance, the wife has the right to apply for a judicial divorce. This form of divorce was not generally practised in India. Hidayatullah, Mulla's Principles of Mahomedan Law, 265.

⁵¹*Khula* was a Muslim marriage dissolved by an agreement between the husband and wife, at the instance of the wife. The wife agrees to give compensation to the husband for her release from the marriage. For example, a wife may agree to give up her dower (*mahr*) to her husband. Hidayatullah, Mulla's Principles of Mahomedan Law, 265.

⁵²*Mubara'at* is another form of Muslim divorce by mutual consent, at the instance of both parties with no need for compensation by either party. Hidayatullah, Mulla's Principles of Mahomedan Law, 265.

⁵³Paras Diwan, Muslim Law in Modern India (Allahabad: Allahabad Law Agency, 1977), 264.

⁵⁴*Fidahusein v. Monghibai* (1936) 38 Bombay Law Reporter, 397.

⁵⁵*Aliyarkhan v. Rambhau* (1947) 49 Bombay Law Reporter 793. However, such a will first had to be made (or revoked) under Muslim Law.

⁵⁶Fyzee, Outlines of Muhammadan Law, 57.

⁵⁷Aqil Ahmad, Mohammadan Law 17th Ed., (Allahabad: Central Law Agency, 1995): 44.

⁵⁸*Ashrafalli Cassamalli v. Mahomedalli Rajaballi* (1946) Bombay Law Reporter 642. The judgement was made by Mr. Justice Chagla in 1945.

continued to be governed by customary law, that is a law largely analogous with Hindu law, in disputes regarding agricultural land.⁵⁹

Conclusion

The Khoja community's heterodox customs and practices posed a judicial puzzle for the colonial legal system. Perry's 1847 recognition of a Khoja custom (disinheriting daughters) analogous to Hindu law led to the application of Hindu law in a whole range of other personal legal matters. By the late nineteenth century, Bombay justices suggested that the administration consider an enactment to govern the Khoja community. By this point, the colonial legal system had moved away from an early phase of 'discovery' -- both in terms of uncovering Hindu and Muslim 'legal' texts and in term of recognizing certain customs unique to particular families or communities. Instead, the environment fostered codification and sought rationalization of personal laws. The Government recognized the unique cultural, religious, and legal position of the Khoja community, placing them on par with the legal distinctiveness of the Zoroastrian Parsis. This recognition led to the formation of the 1878-1885 Khoja Law Commission. The proposed Khoja Bills before the Commission sparked debates over women's inheritance rights. This discourse, generally, was highly skeptical of women's abilities and sensibilities, and, hence, sought to restrict their access to, and management of, inherited property. The failure to enact a law for the Khojas was primarily a result of the rancor felt by opposing factions.

However, the proposed Bill did not accurately reflect the wishes of all Khojas, as more and more Khoja individuals chose to write wills which protected the interests of their female family members and were partially in accord with Islamic norms. This shift in legal preferences away from Hindu law was very much a product of Muslim social, political and religious resurgence of the late nineteenth - early twentieth century, with homogenous Islamic identities favoured. The 1920 Kutchi Memon Act was a reflection of this new religious and cultural feeling. By the time that the 1937 Shariat Act was introduced, no significant

⁵⁹It is noted that: "Notwithstanding the passing of the Shariat Act of 1937, the Khojas and Cutchies are still governed by Hindu law in certain matters (such as succession) on the ground of usage in regard to agricultural land." S. V. Gupte, Hindu Laws of Succession (Bombay: N. M. Tripathi, 1963), 330. This exception is also noted in: Fyzee, Outlines of Muhammadan Law, 57; and Hidayatullah, Mulla Principles of Mahomedan Law, 16.

opposition to the application of Muslim law was voiced by any of the Muslim sects of Western India which had previously been governed by an amalgam of Hindu and Muslim law. The 1937 Shariat Act, however, outlined relatively rigid understandings of Sunni and Shi'a Islamic law. For modern reform-oriented Muslims, several provisions later proved to have conservative interpretations and chauvinistic applications in independent India. The repercussions of this Act continue to be felt in India today, with agitation in favour and against the creation of a Uniform Civil Code for all communities. In these debates, women's issues and religious identity are key.⁶⁰

⁶⁰Pakistan has modified many provisions in the Shariat Act. Some of these changes sought to ameliorate the legal status of women, while others sought to bring the personal laws of Muslims in Pakistan more in line with revivalist and fundamentalist ideals, with negative consequences for women.

Chapter Seven

Conclusion

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CONCLUSION

The Khoja community presents a fascinating case study of a community in transition from religious heterodoxy to clearly defined religious identities -- be they Aga Khani Isma'ili, Ithna 'Ashari Shi'a or Sunni. From 1847-1937, the Khojas of Western India were distinguished as a distinct community by the British, requiring judicial recognition of their unique customs and practices. The colonial legal system was very much a contributing factor in the later refinement and articulation of Khoja 'custom' pertaining to women's rights of inheritance. The colonial courts' response to claims of particular customs and practices fostered a more conservative and restricted understanding of Khoja women's rights of inheritance and control over inherited property than was ever understood by Khoja women themselves.

The thesis began by showing how the entire problem of Khoja female inheritance has been inadequately explored in previous studies. It then examined the religious heritage of the Aga Khani Qasim-Shahi Nizari Isma'ili Shi'as. The various schisms led to doctrinal innovations quite distinct from mainstream Islam. Key to the cultural, religious and legal position of the Khojas in the early nineteenth century was their conversion by Nizari Isma'ili missionaries in the twelfth century. Pir Satgur Nur and Pir Sadr al-Din preached a form of Islam deeply rooted in the Hindu religious pantheon. The Khoja sacred book, the *Das Avatar*, is a remarkable reflection of this syncretic blending of Hinduism and Islam. In addition, the Khoja community's relative autonomy from their spiritual leader allowed the continuance of many Hindu customs and practices not acceptable even within Nizari Isma'ili Islam. The transference of the Imamate from Persia to India in the early nineteenth century led to tensions between certain members of the Bombay Khoja community and the Aga Khan I. These disputes played a significant role in many of the court cases examined in this study and provided an important backdrop to developments in the Khoja community over a variety of issues, including female inheritance.

The study then examined early developments in the colonial legal system. The East India Company sought to translate the whole range of indigenous customs and practices into standardized personal laws, which were then applied in British legal framework and form to

various Indian communities. Initially, Hindu *pandits* and Muslim *ulema* were consulted to provide relevant expertise and guidance in personal legal matters. However, by the early part of the nineteenth century, specific religious texts and commentaries were extensively used as the basis of Hindu and Muslim laws. Certain Hindu and Muslim traditions were, thus, privileged over others and a new paradigm for personal laws was created. The colonial understanding of Muslim law presumed that Muslims were a homogenous community -- while nothing could be further from the case in India, particularly in the Bombay Presidency. Confronted with considerable cultural and religious heterodoxy, and significant divergence from the Muslim norms recognized in British sanctioned guides to Muslim law, Bombay Regulation IV of 1827 was adopted. It permitted the modification of personal laws by established family or community 'customs.' Communities, like the Khojas of Western India, were perceived to be 'quasi-Muslims' and hence, 'custom,' not Muslim law, could be applied in personal legal disputes.

The core of this study was concerned with uncovering, largely from little used archival records and law journals, the actual instances in which Khoja female inheritance came under dispute, and how the colonial legal system responded. The selective acceptance of certain general testimonies resulted in a similarly selective determination of alleged customs. The resultant contradictory application of either modified Hindu law or Muslim law generally had negative legal consequences for Khoja women as a whole. By contrast, individual Khoja women proved themselves to be dynamic and far from the stereotypes bandied about by male jurists and male members of the community regarding women's intelligence, character and abilities. These individual Khoja women challenged the restrictive ideas about their access to, and control of, property. To understand the implications of the Khoja court cases, it will be useful to review briefly the general issues raised in them.

'Custom' and the Khojas

Nearly all later guides to Hindu and Muslim law refer to Perry as having "established that Hindu law ought to be administered to Khojas and Memons, who, by their custom and usage, have been following that law, though they professed Islam."¹ While Perry set the stage for

¹The section "Who is a Muslim: Application of Muslim Law" in Paras Diwan, Muslim Law in Modern India (Allahabad: Allahabad Law Agency, 1977), 7.

the application of Hindu laws of succession and inheritance to the Khoja community, he appeared to have struggled to provide a ruling which reflected what he understood to be a particular Khoja custom which disinherited daughters yet at the same time avoid thereby creating a binding legal precedent for future cases. Notwithstanding this, Sir Matthew Sausse did just what Perry wanted to avoid and turned his predecessor's ruling into a rule of law by mistakenly insisting that Perry had definitively established that the Khoja community was entirely governed by Hindu laws of succession and inheritance.²

Considerable confusion concerning the precise nature of Khoja customs was a direct consequence of dictating such precision. At the same time, in other subsequent court cases, certain customs were permitted while others were disallowed, frequently in a most contradictory manner. For example, in 1875 (*Hirbai v. Gorbai*), Justice Sargent chose to permit the testimonial claim of Khoja custom differing from Hindu law but did not insist upon rigorous proof. Two years later, Chief Justice Westropp and Justice Green (*Hirbai v. Rahimatbai*) ruled that Hindu law must be strictly enforced unless it was definitively proven that a Khoja custom existed which was ancient, invariable, and had several instances to support the existence of the alleged custom. The courts, thus, put themselves in the role of becoming rigid enforcers of established Hindu law in questions of Khoja inheritance and succession. The irony of enforcing Hindu law for a particular Muslim sect in matters of inheritance was rarely questioned until the twentieth century.

In the climate of rationality and codification in the latter part of the nineteenth century, a Khoja woman's assertion that her community practiced 'customs' which protected her interests in divorce was completely ignored. In 1847, it was possible to entertain a 'custom' which disinherited daughters, but by 1871 (*In re Kasam Pirbhai and his wife Hirbai*) an assertion of a 'custom' requiring a woman's consent before she could be divorced and her right to continue to receive maintenance even after a divorce, was quashed. Despite the hardship experienced by Muslim women unilaterally divorced, the courts saw their role as 'enforcers' of Muslim law, not arbiters of either its justice, fairness, or consequences for the 'weaker' sex. This marked a low point for Khoja women's legal position whereby they were deprived of their rights of inheritance by a court enforced adherence to modified Hindu law, on the one hand, and equally

²*Gangbai v. Thavar Mulla* (1863) 1 Bombay High Court Reports, 71.

denied recognition of a different Khoja custom which mitigated the more severe consequences of Muslim divorce and consequently strictly applied Muslim law, on the other. It is interesting to note how the courts chose to ignore the inherent contradictions in their application of Hindu and Muslim law to Khojas and were simultaneously enforcers of both Hindu *and* Muslim law, while at the same time permitting certain 'customs' which were found in neither!

By recognizing the distinctive character of the Khojas, the courts gave considerable legal latitude to Khoja men who wished to use 'custom' as a means to abrogate financial responsibilities to female relations. The rhetoric and climate within which 'customs' were alleged led to suits, like that of *Advocate General v. Rashid Karmali*, in which Khoja men attempted to deny a widow's right of maintenance accorded to her under Hindu law, yet equally ignored a widow's right to inherit a portion of her deceased husband's estate under Muslim law. While the courts chose to uphold a widow's right to maintenance, the very nature of that case, and the one which followed and alleged the widow had been divorced by her husband just prior to his death, revealed the opportunity for abuse of the notion of Khoja 'custom.'

It was not until the twentieth century, and the judicial decisions of Justices Tyabji and Beaman, that misinterpretation of Perry's original decision was effectively challenged. First, Tyabji placed limits on the application of Hindu law in matters of wills.³ Then, Beaman not only applied Muslim law in disputes over gifts and *wakfs*, but also prevented the application of Hindu law in litigation over partition.⁴ Beaman's comment regarding this matter was very telling:

I doubt very much whether in spite of the glib manner in which cases involving such grave consequences are cited, and accepted as final, the learned Judges responsible for most of the important decisions have really given or meant to give the complete law of the Hindu joint family, operation over the Khojas and Memons of Bombay.⁵

³*Moosabhoy v. Yacoobhai* (1905) 7 Bombay Law Reporter 45.

⁴Gifts and *wakfs* were dealt with by Beaman in: *Cassamally Jairjbhai Peerbhai v. Sir Currimbhoy Ebrahim* (1911) 36 Indian Law Reports, Bombay Series 214; *Pestonji v. Framji* (1910) 12 Bombay Law Reporter 683; *Hassonally v. Popatlal* (1912) 14 Bombay Law Reporter, 787. Partition was examined in: *Jan Mahomed v. Datu Jaffer* (1913) 15 Bombay Law Reporter 1044. Significantly, Beaman was also one of the judges in an earlier case which upheld women's rights of both maintenance and inheritance in *Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 615.

⁵*Jan Mahomed v. Datu Jaffer* (1913) 15 Bombay Law Reporter 1053.

Beaman, more than any previous judge, was critical of the manner in which the courts had unquestioningly accepted both counsel's arguments and judges' rulings regarding the application of Hindu law to the Khojas. He clearly believed that the court's application of Hindu law had had a deleterious effect on the community.

In the case of Khoja women's rights of inheritance, the colonial courts, far from providing an 'enlightened example,' instead supported increasingly restrictive ideas about Khoja women's rights of inheritance and privileged the general assertions and opinions of Khoja men over the specific, contrary contentions of Khoja women before the courts. The language of all of the decisions regarding the community reflected this, and in determining Khoja custom, the courts were both patriarchal and elitist in their biases. Testimony which did not accord with judges' preconceived notions was frequently ignored. This was particularly apparent in cases like *In the good of Mulbai*, where there was a clear bias in favour of the wealthier party.

Patriarchal biases were demonstrated in the weight given to assertions of general Khoja customs over specific instances in favour of women's rights. Illustration of this dichotomy is found in the testimony of the Aga Khani *jama'at's* *Mukhi* in *Hirbai v. Gorbai*. The *Mukhi* initially claimed that a widow had no rights of inheritance and that a woman "never manage[s] the property where there are male relations," no matter how distant. He contended that in a case where there was a widow and adult nephew, the nephew took the property and the widow would be maintained by the nephew. During cross-examination, however, he admitted that in such a scenario, he did "not know for certain" and perhaps the widow "manages the property if it is separate, and preserves it for the nephew." Finally, the *Mukhi* exclaimed: "How can the brother's son take [the estate] when the widow is alive?"⁶ Recognizing, in the end, that the widow actually had the primary right to control the property of her deceased husband over his male relations. Such a retraction, and an admission that an alleged custom denying a widow's right to her deceased spouse's property was merely an opinion, not an established fact, was completely ignored by the judge. Instead, the articulation of general principals were accepted over specific admissions to the contrary. As has been demonstrated in many of the cases

⁶*Hirbai v. Gorbai* (1875) 12 Bombay High Court Reports, 311-312. See also testimony by Allurakia Soomar in SRO, JD 1880, 31, *H v. G* Hearing, 48.

examined here, the discourse on restricted or limited inheritance rights for women was given more credence in the courts than instances of Khoja practice where many women clearly assumed they would exercise their authority over property inherited from their deceased male relations.

All of the discourse on female inheritance rights presumed that women were inheriting property from men alone. Yet women controlled property and left it by will to their female relations as well. They did not accept that any property that had once belonged to a man automatically reverted to his next heir-at-law, instead they had their own notions regarding the management of their estates, and disposition of them on their death. Many of the female inheritance cases examined in this study, *Gangbai v. Thavar Mulla*, *Hirbai v. Gorbai*, *Hirbai v. Rahimatbai*, and *Mawjibhai Herjee v. Muljibhoy Rahimbhai*, demonstrated a whole range of Khoja female understandings of their various rights to inherit property that belied the male discourse limiting their rights. Although on a public level, restrictions of women's rights were accepted by both Khoja men and the courts, in practice, even within the courts, if men did not come forward and oppose a woman's right to absolute ownership over property, women's rights were not challenged. Occasionally, the courts even allowed a Khoja woman's right to manage, if not inherit, property to supersede the rights of more distant male relations, as was seen in *Hirbai v. Gorbai*. Thus the courts were not completely consistent in their denial of Khoja woman's rights to inherit property, and occasionally stated that while a woman did not actually *own* property, she could manage it during her life. Attempts to clarify and codify this understanding of restricted rights led to an effort to create legislation to govern the community.

Legislative Response

In terms of regulations or legislation governing the Khojas, the British Indian authorities responded to judicial recommendations, not direct requests from the Khojas themselves. In 1875 and 1877, Justices Sargent and Chief Justice Westropp called for a Bill to govern Khoja inheritance and succession in line with modified Hindu laws. This led to the formation of the Khoja Law Commission which considered the problem of Khoja inheritance and succession from 1878-1885. The Commission based all drafts of Khoja inheritance on Hindu laws of succession and inheritance, with even more limited inheritance rights for Khoja women than

were currently possessed by Hindu women. Fortunately for Khoja women, the Commission failed to reach agreement because of factional fights over which 'women's rights' had been a discursive site for all sides.

By the early twentieth century, a shift had taken place both in minds of Bombay Justices and the Khoja community. In 1913, Justice Beaman urged the Legislature to

very soon step in to relieve these trading communities from the oppression of a system of law which does not properly belong to them, which was imposed upon them under totally different social conditions, and is utterly repugnant not only to their secular interests, but to their own law and religion.⁷

For Memons, the solution was the 1920 Cutchi Memon Act. For Khojas, it was not until the 1937 Shariat Act that the application of Hindu law was effectively overturned in matters of intestate succession and limited in matters of testate succession and inheritance. One commentator on the customary and statutory laws of Muslims in India observed that, prior to the 1937 Shariat Act, the Khojas and Kutchi Memons presented "an interesting spectacle of two Muslim communities caught within the meshes of Hindu Law, and struggling to get out of its trammels."⁸ Whether this was an entirely accurate reflection of Khoja community interests, by the 1930s it certainly appeared that the Khoja communities were much more strongly inclined to follow Muslim law. The Islamic cultural, religious and political awakening, and communally charged atmosphere of the interwar period, likely played a significant role in such a change of opinion.

Ironically, around the same time that Khoja women finally gained the right to inherit property according to Muslim law, in cases of intestate succession, Hindu laws of inheritance were being challenged for their gender biases, particularly in the area of female inheritance and women's control of property.⁹ By 1935, there were even Bills being considered which placed Hindu daughters' inheritance rights on par with their male siblings, the 'litmus test' of 'Hindu' law for the Khoja community.¹⁰

⁷*Jan Mahomed v. Datu Jaffer* (1913) 15 Bombay Law Reporter 1053.

⁸Hamid Ali, "The Customary and Statutory Laws of the Muslims in India" Islamic Culture 11 (1937), 355.

⁹See Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India (New Delhi: Sage Publications, 1996), 55-7.

¹⁰See: "Daughters in Hindu Law" Bombay Law Reporter Journal 37, 5 (March 15, 1935), 17-23.

The Authority of the *Jama'at Khana*

A corollary to the Khojas resorting to the British colonial courts to solve their personal disputes was the consequent undermining of their own decision making body. From 1847-1937, the colonial legal system gradually limited the authority of local caste and community governing bodies to religious affairs, community functions, and minor family squabbles, not personal law as defined by the courts. While the *jama'at khana* was clearly also patriarchal in its decisions,¹¹ in family disputes, the *jama'at* was frequently able to obtain compromises which were fairer to the female parties involved. However, as men could simply resort to the courts to overturn any such agreements, community efforts to mitigate the negative consequences of strict application of either Hindu or Muslim law were completely undermined. In 1905, for example, the court ruled against a compromise agreement made under the direction of the *jama'at* in *Meherally v. Sakerkhanoobai*. The court chose, instead, to uphold the strict application of Muslim law in matters of marital discord and divorce. It ignored the more equitable arrangement made by the *jama'at*, even while acknowledging that the “matrimonial law of the Mahomedans, like that of every ancient community, favours the stronger sex.”¹²

The Government sought, in other ways, to limit the power of the *jama'at* to dispose of unclaimed property. In 1866 (*In the goods of Mulbai*), the colonial court was willing to recognize that if there was no immediate successor to intestate property, the *jama'at* had the authority to dispose of the property as it saw fit. By the mid 1880s, however, the Government position was that such property belonged to the Government, and the *jama'at khana* had no such authority. During the 1878-1885 debates over the proposed Khoja Bill for inheritance and succession, a significant objection of the Aga Khani Khoja *jama'at* was that the Bill, as drafted, undermined the authority of the *jama'at khana*. Some Government officials refused to budge on this point and defended the Government's right to seize intestate Khoja property where no immediate successors were found, rather than permit it to fall into the hands of the *jama'at khana's* *Mukhi* and *Kamaria*, and through them, possibly to the Aga Khan.

Muslim Women and Inheritance

Unlike the early assumption by the British that there existed a single Islamic system of

¹¹This was particularly glaring in the area of Khoja widow's maintenance.

¹²*Meherally v. Sakerkhanoobai* (1905) Bombay Law Reporter, 608.

law, the colonial legal system soon recognized certain anomalous customs, then also accepted distinctions between the various legal 'schools,' and Sunni and Shi'a 'laws.' The complex issues arising from inheriting an estate or property, receiving wealth as a gift or annuity, distributing or transmitting such wealth or property through a will or intestate succession, challenged the British justices. They were faced with a wide gap between Islamic ideals and Muslim practices. The *Koran* stipulated inheritance rights for women, both from their natal family and from their spouse, and, furthermore, that such property was to remain in a woman's control. However, this was, and continues to be, more often than not, an ideal not completely followed in Muslim societies. For Muslim women in India, the presence of the colonial courts and its laws presented an opportunity to access these *Koranic* injunctions and go outside of their community decision making bodies and the old Mughal apparatus to press for their rights of inheritance.

The courts in India, however, were sometimes reluctant to enforce strict Muslim ideals which provided for significant property rights for women. For most Muslim women, a woman's right to a half share was generally preserved, particularly as such notions as 'half shares' were consistent with British notions of gender inequality. However, for many other Muslim women, the colonial courts recognized customary laws which prohibited female inheritance. The Khoja cases provided a prominent precedent and example of how *Koranic* injunctions regarding women's rights could be abrogated through the acceptance of particular 'customs'.

The Khoja Muslims, while culturally and religiously distinct, were not alone in claiming the existence of a 'custom' which disinherited daughters. Such allegations of customs, such as the disinheritance of daughters, were replicated by other Muslim families and communities. The Bombay law reports are full of cases where Muslim women sued for possession of their inheritance rights and their male relations used 'custom' as the reason to deny their plea. Generally, these allegations against women's rights were accepted, however, some Muslim women's rights of inheritance were upheld. However, in such allegations of 'custom,' daughters, in particular, were most often denied any rights of inheritance.¹³ Perry's

¹³The majority of these cases denied women rights of inheritance: *Muhammad Kamil v. Imtiaz Fatima* (1908) 36 *Indian Appeals* 210; *Umar Khan v. Niaz-ud-din Khan* (1911) 39 *Indian Appeals* 18; *Abdul Hussein Khan v. Bibi Sona Dero* (1917) 45 *Indian Appeals* 10; *Muhammad Ibrahim Rowther v. Shaikh Ibrahim*

‘disinheriting daughters’ in the 1847 cases served as a precedent which was embraced for many Muslim families and communities. The legal ramifications, thus, went far beyond the Khoja community itself and impacted on a number of Muslim communities throughout the region.

By and large, though the claim of daughter’s disinheritance by other Muslim families was accepted, it did not necessarily mean these Muslims followed Hindu laws of inheritance. Only certain communities were forced into a similar legal mould as the Khojas. The Kutchi Memons, as has already been discussed, were linked with the Khojas in Perry’s original 1847 decision regarding female inheritance. Other ‘quasi-Muslim’ commercial communities were also perceived to be partially governed by Hindu law. The Bohras, for example, were also originally Hindu and had been converted by Isma’ili missionaries around the same time as the Khojas. Like the Khojas, the Bohras were governed by customary laws of inheritance analogous with Hindu law, with the denial of a daughter’s rights of inheritance becoming the key to their community’s ‘customary law.’ The Girasia community’s position on women’s inheritance echoed that of the Khojas, Kutchi Memons and Bohras, and was similarly recognized by the colonial courts.¹⁴

The Bombay Presidency was not alone in recognizing special customs of distinctive Muslim sects. Muslim tribes in the Punjab were also recognized by the colonial courts, particularly in section 5 of the 1872 Punjab Laws Act, to be governed by customary law. Accordingly, customary law prevailed in matters of succession and inheritance, special property of females (whereby any property received by a female by gift or inheritance reverted to the heirs of the last male owner), betrothal, marriage, divorce, adoption, guardianship, minority, bastardy, family relations, wills and legacies, gifts, partitions or any religious usages or institution.¹⁵

Though other Muslim families and groups alleged customs which disinherited daughters and restricted women’s rights to control property, by the early twentieth century, the colonial courts had started to recognize that simply because a family or community did not always

Rowther (1922) 49 Indian Appeals, 119; *Nisar Ali Khan v. Fatima Sultan* (1941) 68 Indian Appeals 104.

¹⁴For examples of Girasias cases excluding women from inheritance, see: *Abhesang Tirabhai v. Raisang Fatesang* (1912) 14 Bombay Law Reporter 602 and *Agarsinghi Raisinghi v. Bai Naniba* (1915) 17 Bombay Law Reporter 273.

¹⁵Diwan, Muslim Law in Modern India, 8.

traditionally exercise such rights of inheritance, this did not necessarily mean that women, and daughters in particular, did not possess these rights. Hence groups which later alleged such customs were occasionally subjected to either rigorous investigations or dismissed. For example, in the 1901 *Jafri v. Ali Raza* case, a special family custom was alleged by which the widows of the deceased excluded the daughters from inheritance.¹⁶ The custom was exactly the same as that which had been put forth in the 1847 Khoja Female Inheritance cases. However, in contrast to Perry's earlier decision regarding the Khojas and Kutchi Memons, the Lords¹⁷ hearing the case decided "against the existence of the custom."¹⁸

To understand why the courts were willing to disinherit daughters, restrict widow's rights to control property from their spouses, and also uphold the rights of Khoja men to unilaterally divorce their wives, recognition must be made of the role Khoja men played in articulating customs which supported these patriarchal positions. A symbiotic relationship existed between the judges and solicitors wishing to hear certain testimony on Khoja customs and practices and Khoja men being informed by their participation in legal affairs and providing evidence in the courts as per what the courts wished to hear. As a result, Khoja men began to see their general notions or ideals about women's control of property fit by an alien legal system into a standardized set of laws governing Hindus, not Muslims, in India. The interests and cultural ideals of Khoja men were, thus, privileged over the assertions of women themselves. The court's interpretation of these ideals was a conservative understanding of Hindu law, further restricted and modified by additional Khoja customs. This, then, was the law imposed on the Khoja community for nearly a hundred years. In the face of the colonial rulings, the positions taken by Khoja female litigants was a testament to their strength and character. The women featured in the court cases considered in this study faced each other and men to fight for rights they believed were theirs. Eventually, in 1937, the Shariat Act, shaped by an increasingly Indian controlled legislature, provided inheritance rights for Khoja women under Muslim law.

¹⁶*Jafri Begum v. Syed Ali Raza* (1901) 3 Bombay Law Reporter 311. The dispute was over the estate of a Shi'a Muslim, Saiyed Ashik Ali, between one daughter, Jafri Begum, and a grandson, Syed Ali Raza, by his other daughter, Abbasi Begam, who instituted the suit on behalf of her son.

¹⁷The case was heard by Lord Macnaghten, Lord Davey, Lord Lindley and Sir Richard Couch.

¹⁸*Jafri Begum v. Syed Ali Raza* (1901) 3 Bombay Law Reporter 316.

The ultimate irony was that in that very year, Hindu laws were also being revised with the aim of ameliorating Hindu women's access to, and control of, property, resulting in the Hindu Woman's Right to Property Act. Thereafter, Hindu women gained an increasing number of legislated rights.¹⁹ With the 1956 Hindu Succession Act, independent India recognized inheritance rights for Hindu women on par with men. Hence, by the time that Khoja women finally gained the right to inherit and control property according to Muslim law, the legal position of Hindu women *vis-a-vis* property rights were dramatically improving, and eventually were far more enhanced and equitable than those possessed by Muslim women under the Shariat Act.

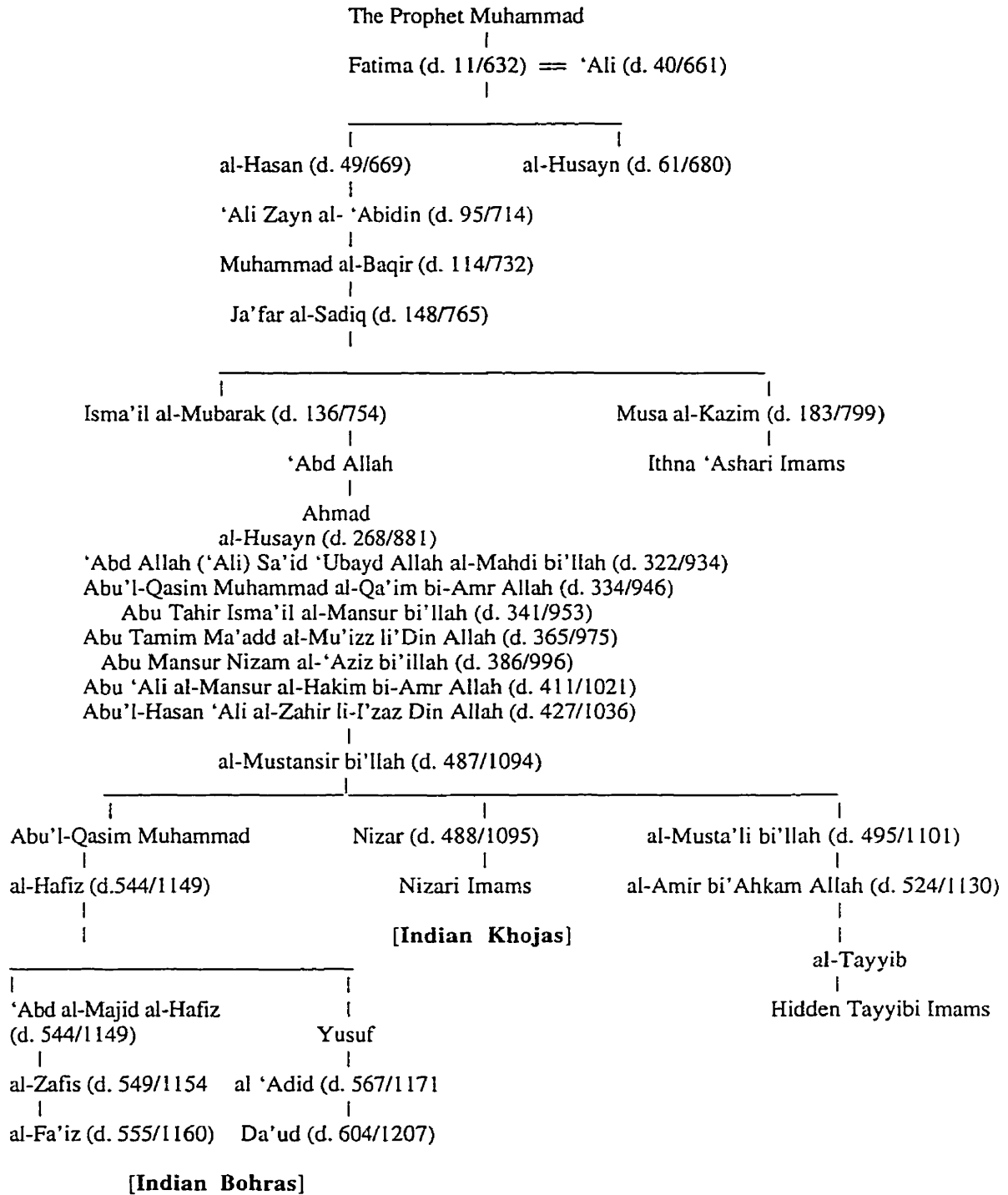
This thesis is first and foremost a significant contribution to the field of Indian colonial history because it breaks new ground in research on Muslims in India, the colonial legal system, the treatment of women by the courts, and the Khoja community specifically. This is the first study to trace the development of the special legal status of Khoja women over a hundred year period. The cases examined here expose contradictions and failings in the formulation and application of Hindu and Muslim law. They also reveal the patriarchal bias of the colonial courts which tended to undermine, rather than protect or expand, women's rights in India. While this alone is not unexpected, the manner in which a decision to impose Hindu law on a small Muslim sect, and thus deny them inheritance rights under Muslim law, then became the basis for denying other Muslim women of their rights under Muslim law requires critical examination. The impact of the various decisions on the legal position of Khoja women, are, therefore, subjects introduced in this study which have ramifications far beyond this distinctive community.

¹⁹These acts pertained to a wide range of legal issues. A brief list of Acts which aimed, in part, to positively impact on women include: the 1938 Inheritance Family Provisional Act; the 1946 Bombay Prevention of Hindu Bigamous Marriage Act; the 1946 Hindu Women's Right to Separate Residence and Maintenance Act; the 1950 Bihar Dowry Restraint Act; the 1952 Maternity Benefit Act (Travancore); the 1954 Special Marriage Act; the 1954 Saurashtra Prevention of Hindu Bigamous Marriage Act; the 1955 Hindu Marriage Act; the 1956 Hindu Adoptions and Maintenance Act; the 1956 Orphanages and Women's Homes (Supervision and Control) Act (Delhi); 1956 Suppression of Immoral Traffic in Women and Girls Act, and so forth. For more information regarding these acts, see: Indu Prakash Singh, Women, Law and Social Change in India (Delhi: Radiant Publishers, 1989).

Appendices

Appendix I

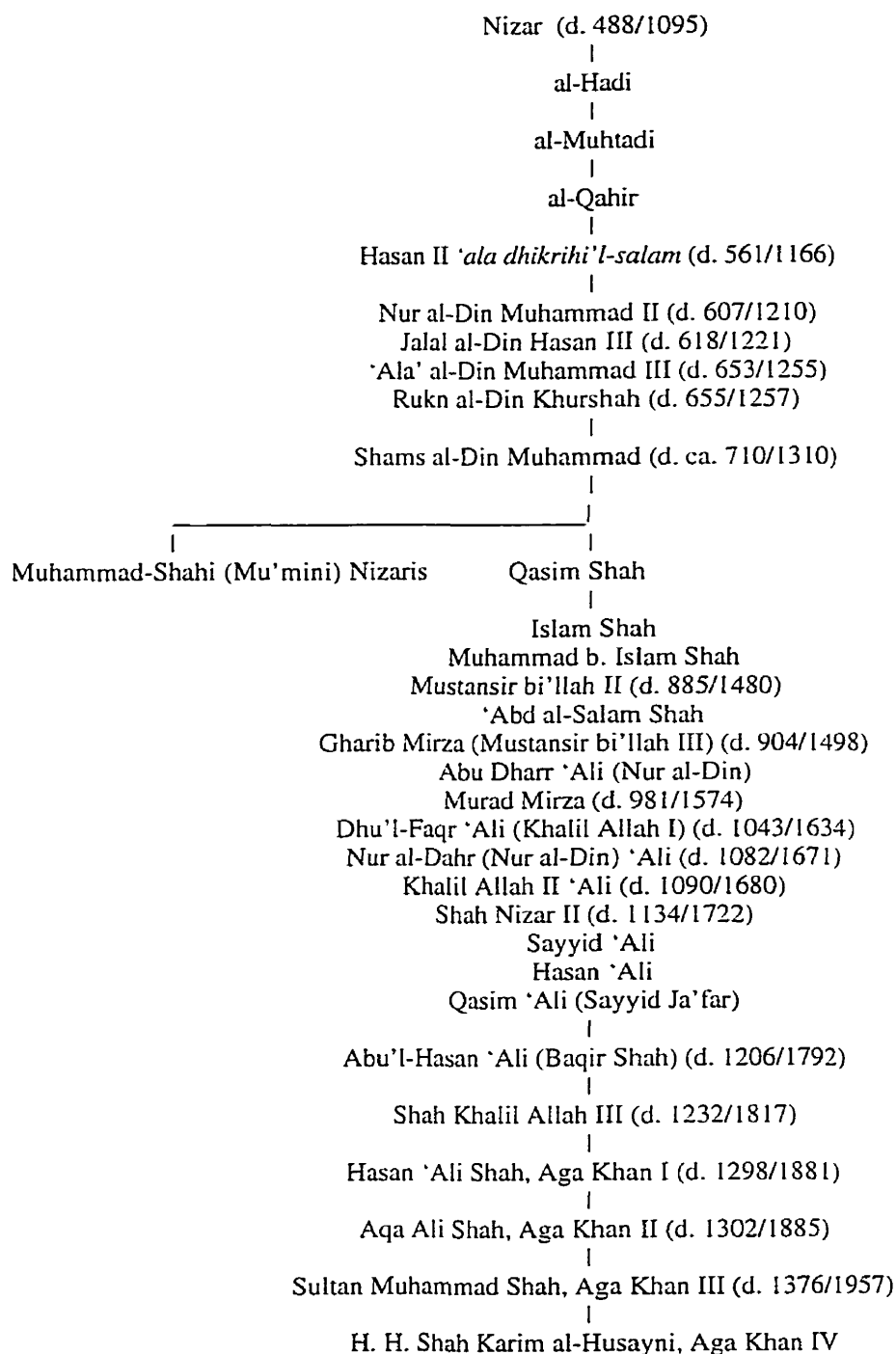
Genealogy of the Shi'a Isma'ili Nizari Imams¹



¹ Adapted from Farhad Daftary, *The Isma'ilis: Their History and Doctrines* (Cambridge: Cambridge University Press, 1990), 550-2.

Appendix II

Nizari Qasim Shahi Imams¹



¹ Adapted from Farhad Daftary, The Isma'ilis: Their History and Doctrines (Cambridge: Cambridge University Press, 1990), 553.

Appendix III

Hindu Succession and Proposed Khoja Succession Compared¹

Under Hindu Law

Among Khojas

In an undivided family

<i>Under Hindu Law</i>		<i>Among Khojas</i>
1. Sons		1. Sons
2. grandsons		2. Grandsons
3. Great-grandsons		3. Great-grandsons
4. Other male co-parceners		4. Great-great-grandsons
		5. Other male co-parceners

In a divided family

<i>Under Hindu Law</i>		<i>Among Khojas</i>
1. Sons		1. Sons
2. Grandsons		2. Grandsons
3. Great-grandsons		3. Great-grandsons
4. Widow		4. Great-great-grandsons
5. Daughters		5. Father
6. Daughters' sons		6. Mother
7. Mother		7. Widow
8. Father		8. Daughters
9. Brothers		9. Daughters' sons
10. Half brothers		10. Brothers
11. Brothers' sons		11. Sons' daughters
12. Half brothers' sons		12. Brothers' sons
13. Grandmother		13. Half brothers
14. Sister (under the Mayukha)		14. Half brothers' sons
15. Grandfather		15. Grandfather
16. More distant relatives		16. Grandmother
		17. Paternal uncle
		18. Sister
		19. More distant relatives

¹National Archives of India, Home, Revenue and Agricultural Program, Judicial Department, March 1880, Proceeding 130, Index 25, 13.

Appendix IV

Khoja Case Notes

Reference Style:

Case Title (report year) Report Title pages.

Alternative case report or full title including: name (original case) APPEAL

Date: Decision (Hearing dates)

Judge:

Counsel: Original case counsel,
Appeal attorneys

Court: Additional court information; appeal information

ISSUES: Case issues as noted in the case report

Additional reference information

Judgement/Case relevance: Case precedent or ruling. If there is no direct relevance to the present study, only a brief statement regarding the case is noted.

Hirbae v. Sonabae (1847) [Reprinted in Perry, Oriental Cases, 110-129]

The Khojas and Memons' Cases

Date: 19, 20 June, 15 September, 11 October 1847. (also refers to dates for Memon's case)

Judge: Sir Erskine Perry

Counsel: Howard and Wallace for the plaintiffs
Dickinson and Holland for the defendants

The Telegraph and Courier (Bombay edition) 1, 148 (24 June 1847) and 1, 174 (5 August 1847), 808.

Judgement: In the absence of proof of special usage to the contrary, Khojas and Kutchi Memons in the Bombay Presidency were governed in matters of succession and inheritance by rules analogous to Hindu law. Hence, daughters of a deceased coparcener are entitled against the surviving coparceners to no more than maintenance until marriage and marriage expenses.

The Great Khoja Case (1851)

Advocate General, at the Relation of Vully Noor Mahomed and others v. Dossa Ladock and others..

Date: 21 July 1851

Judge: Sir Erskine Perry

The Bombay Times and Journal of Commerce (21 July 1851), 1033-4.

Telegraph and Courier (Bombay edition), 5, 58 (8 March 1851), 243-4.

Telegraph and Courier (Bombay edition), 5, 61 (12 March 1851), 243-4.

Telegraph and Courier (Bombay edition), 5, 243 (10 October 1851), 971.

Judgement: A 'Declaration of Rights' was drawn up to provide a guideline for the rights and responsibilities regarding Khoja community property, including access to the property, binding on both factions.

Gangabai v. Thavar Mulla (1863) 1 Bombay High Court Reports 71.

Gangabai, wife of Nu'r Muhammad Dattu-Bhai, Plaintiff v. Thavar Mulla, Executor of Rahimatbai, widow of Sajan Mir Alli, Defendant.

Date: 10 September 1863 (heard 14 August 1863).

Judge: Sausse, Chief Justice

Counsel: White for petitioner, Gangabai.
Green (with Dunbar) for Executor, Thavar Mulla.

Court: Late Supreme Court, Equity Side.

ISSUES: Will - Charity - Charitable Bequest - Dharm - Gift in Dharm - Stat. 43 Eliz., c. 4

Judgement: The will of a Khoja is to be constructed according to Hindu law. A bequest in favour of *dharm* is void, but the word 'charity' in a Khoja will made in the English form and language does not necessarily mean *dharm*, hence charitable bequests are valid.

In the goods of Mulbai (1866) 2 Bombay High Court Reports 276-285.

In the good of MULBAI (deceased). Karim Khatav, applicant v. Pardhan Manji, Caveator.

Date: 26 Feb. 1866 (heard 22, 23, and 24 February 1866).

Judge: Couch, Acting Chief Justice

Counsel: J. S. White (Acting Advocate General) and Scoble for the applicant, Karim Khatav
O'Leary (with McCulloch) for caveator, Manji

Court: Ecclesiastical Side

ISSUES: Succession - Custom of Khojas - Administration

Judgment: By Khoja Muslim custom, when a widow dies intestate and without issue, property acquired from her deceased husband descends not to her blood relations, but to the relations of her deceased husband. If no relations of the deceased husband are forthcoming, the property left by the widow belongs to the *jama'at*.

Advocate General v. Muhammad Husen Huseni (Aga Khan) (1867) Bombay High Court Reports 203-208.

Advocate General ex relatione Daya Muhammad, Muhammad Saya, Pir Muhammad Kasambhai, and Fazal Hai Gulam Hussen v. Muhammad Husen Huseni (otherwise called Aga Khan) et al

Date: 11 October 1867 [Original suit, Date: 16 April 1866]

Judge: Arnould

Court: Late Supreme Court, Equity Side

ISSUES: Terms on which new relators will be allowed to come in after decree to prosecute an appeal.
Petition dismissed.

Judgment: Petition to bring new relators for to the 1866 Aga Khan Case dismissed.

In re Kasam Pirbhai and his wife Hirbai (1871) 8 Bombay High Court Reports 95-101.

Date: 21 July 1871 (heard 20 & 21 July 1871)

Judge: Westropp, Chief Justice and Bayley

Counsel: C. Tyabji for Kasam Pirbhai
G. S. Lynch, Acting Attorney for Paupers for Hirbai

Court: Crown Cases

ISSUES: Order for Maintenance upon Husband - Muhammadan Law - Divorce of Wife by Husband - Effect upon Order - Act XLVIII. of 1860, Sec. 10 - Custom - Khoja Muhammadans - Divorce.

Judgment: An order made by the Magistrate under Act XLVIII of 1860 (Police Amendment Act), Sec. 10, directing a Muslim husband to pay a monthly sum for the maintenance of his wife, does not deprive such husband of his inherent right to divorce his wife. After such divorce, the Magistrate's order can no longer be enforced. Customs as to divorce amongst Khoja Muslim Sunnis considered, but dismissed, and mainstream Sunni divorce practices enforced.

Shivji v. Datu (1875) 12 Bombay High Court Reports 281-294.

Shivji Hasam and others (defendants) APPELLANTS v. Datu Mavji Khoja (Plaintiff) RESPONDENT.

Date: 29 April 1874.

Judge: Westropp, Chief Justice and West

Counsel: Nanbhai Haridas for the appellants, Shivji Hasam and others
Macpherson (with M. C. Apte) for the respondent, Datu Mavji Khoja

Court: Appellate Civil Jurisdiction. Special Appeal No. 316 of 1872.

ISSUES: Bombay Minors' Act XX of 1864, Section 1 - Bengal Minors' Act XL. of 1858, Section 2 - Age of majority - Charge of minors' property - Custom among Khojas - Joint Hindu family.

Judgment: A Khoja father, like a Hindu father, has the power to mortgage family property for family purposes.

Hirbai v. Gorbai (1875) 12 Bombay High Court Reports 294-322.

In the Goods, Chattels, Rights, and Credits of Rahimbhoy Alloobhoy, late of Bombay, Khojah Mahomedan, deceased. Heerbaee, Widow of said deceased. Applicant. Gorebaee Ramutbaee, Caveatrixes.

Date: 2 July 1875 (heard 15 Dec 1873, Jan 1874, Feb 1874, 22 June 1874)

Judge: Sargent

Counsel: Ferguson and Macpherson for applicant, Hirbai
 Scoble (Advocate General) and Pigot for caveatrix, Gorbai
 Latham and Inverarity for caveatrix, Rahimbhai
 Mayhew and B. Tayabji for caveators. Fazulbhai Kasambhai and Gulam Husen Jafferbhai

Court: High Court of Judicature at Bombay, Ecclesiastical Side. Appeal No. 255.

ISSUES: Khojas - Succession - Letters of Administration - Custom

H v. G. bound in SRO, Judicial Department, 1880, 31, 45-151. Includes originals of Sir Charles Sargent's Notes of the Hearing (including all testamentation); His judgement; Order of Court thereupon and Heerbaee's Memorandum of Appeal against the said Judgement and Order.

Judgement: In the absence of satisfactory proof of a custom differing from Hindu law, the courts of the Bombay Presidency apply Hindu law of inheritance and succession to the Khojas. If a custom opposed to Hindu law is alleged to exist amongst Khojas, the burden of proof rests upon the person setting up that custom. The courts do not apply to the Khojas, when seeking to prove a custom of inheritance or succession differing from the Hindu law, the stringent rule that the custom must be proved to be ancient, invariable, and submitted to a legally binding, but may act upon satisfactory evidence that it has been the general custom and accepted as such by the great majority of the Khoja community. A Khoja having died intestate, and without leaving issue, was survived by his mother (a widow) his wife and a married sister. *Held* that according to the custom of the Khojas, his mother was entitled to the management of his estate, and, therefore, to letters of administration in preference to his wife or his sister.

***Rahimatbai v. Hirbai* (1877) 3 Indian Law Reports, Bombay Series 34-41.**

Date: 1 September 1877. (Facts from 5 March 1877 judgement by Sargent used. No new hearing)

Judges: Sir M. R. Westropp, Chief Justice, and Mr. Justice Green.

Counsel: J. Marriott (Advocate General), Purcell and Lang for plaintiff, Hirbai
 Pigot and Inverarity for defendant, Rahimatbai

Court: Original Civil Suit No. 691. Appeal No. 332

ISSUES: Khojas - Inheritance - Custom - Evidence - Burden of Proof

Judgement: The widow of a Khoja Mahomedan who died childless and intestate succeeds to her husband's estate in preference to his sister. Where a defendant alleged a special custom of the Khoja community at variance with the Hindu law of inheritance, it was held that the burden of proving the custom rested upon her. In order to prove a Khoja custom of inheritance, evidence merely of the opinion of the leading members of the sect was not enough. Instances had to be proved in which the alleged custom was observed and followed. Hence, there was no special usage prevailing among the Khojas entitling a sister to succeed in preference to a widow. Also found that a mother entitled to the management of her son's estate did not hold the property absolutely, hence could not bequeath the estate to her daughter.

***The Municipality of Bombay v. Ahmedbhai Habibhai* (1889) 1 Bombay Law Reporter 12-15.**

Date: 12 June 1889

Judge: Mr. Justice Parsons and Mr. Justice Ranade

Court: Criminal Reference, No. 128 of 1898.

ISSUES: Bombay Municipal Act (III of 1888) - Construction of Sec. 249 - "are employed" - Meaning.

Judgement: Ahmedbhai Habibhai was charged under the Bombay Municipal Act for failure to comply with municipal law and construct new privies after a fire destroyed previous receptacles at his cotton mill.

***In re Suleman Varsi* (1889) 1 Bombay Law Reporter 346-347.**

In Re Suleman Varsi v. Sakinabai

Date: 14 June 1889

Judge: Mr. Justice Parsons and Mr. Justice Ranade

Counsel: Kirkpatrick, with Payne, Gilbert and Sayani for the applicant, Sakinabai
 Branson, with H. C. Coyaji, for the opponent, Suleman Varsi

Court: Criminal Revision, No. 37 of 1899

ISSUES: Criminal Procedure Code (Act V of 1898), Sec., 488 - Maintenance, order of - Divorce of wife by Husband - Effect of divorce upon order of maintenance - Khoja Mahomedans - Jamat, consent of.
Judgement: An order made by a Magistrate under the Criminal Procedure Code, Sec., 488 directing a Muslim husband to pay a monthly sum for the maintenance of his wife cannot preclude the husband from divorcing his wife. The husband was not liable to pay maintenance after the date of divorce. After that date, the Magistrate's order could not be enforced. Khoja Shi'a divorce customs not considered.

Ahmedabhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy, and Rahimbhoy Alladinbhoy
(1889) 13 Indian Law Reports, Bombay Series 534-548.

Ahmedabhoy Hubibbhoy (Defendant and Appellant) v. Cassumbhoy Ahmedbhoy (Plaintiff and Respondent), and Rahimbhoy Alladinbhoy (Defendant and Respondent)

Date: 21 June 1889

Judge: Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Bayley.

Counsel: Latham (Advocate General) and Starling for appellant, Ahmedbhoy Hubibbhoy
Lang and Jardine for respondent, Cassumbhoy and Rahimbhoy
Ardeshir, Hormusji and Dinsha for the plaintiff (respondent) in the appeal
Jefferson, Bhaishankar, Dinsha and Kanga for the first defendant (appellant) in the appeal

Court: Original Suit No 382 of 1884; Appeal No. 602.

ISSUES: Khoja Mahomedans - Law applicable to - Partition - Right of a son to claim partition of ancestral property in his father's lifetime - Custom, proof of - Ancestral property - Wealth amassed in trade - Evidence - Burden of Proof.

Judgement: The rule that Hindu law, in the absence of proof of custom to the contrary, was the law applicable to Khoja Muslims was not understood in its widest sense, but confined to questions of inheritance and succession. The right of a son to partition in the lifetime of his father, was one upon which the greatest doubt and difference of opinion prevailed, and consequently there was no presumption in favour of its inclusion in the Hindu law. Based on the evidence, it was not established that amongst Bombay Khojas there was any recognized right of a son to demand partition in the lifetime of his father, although it was proved to be customary in Kathiawar and Kutch for a father to give a son who wished for it his share of the family property, both ancestral and self-acquired. It was also held that based on the evidence, that there was no sufficient proof that the property, of which the plaintiff sought partition, was ancestral property. Where wealth was amassed in trade by an individual, it was not enough to show that he inherited some property; it had to be shown that the property inherited contributed in a material degree to the wealth so amassed. The earlier decree by Mr. Justice Jardine holding that the property in question was ancestral, and that the plaintiff could call for partition was reversed.

Karim v. Heinrichs (1901) 3 Bombay Law Reporter 472-476.

Karim Nensey (Plaintiff) APPELLANT v. Heinrichs and another (defendants) RESPONDENTS

Date: 13 June 1901

Judge: Lord Hobhouse, Lord Macnaghten, Lord Robertson, Sir Richard Couch and Sir Ford North

Counsel: Lawson, Walton and Mayne for appellant
Haldane, Jardine and Kenjoy Parker for the respondents

Court: On appeal from the High Court of Judicature at Bombay.

ISSUES: Maintenance, contract for - Duration of such contract - Grantor's life-time.

Judgement: Gifts or contracts expressed to be for maintenance, and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity; but *prima facie* they are limited to the life either of grantor or grantee. The defendants passed an agreement to the plaintiff which stated: "we hereby agree to pay you on behalf of Mr. Nensey Peeroo a sum of five hundred per month... until such time as your father, Mr. Nensey Peeroo, makes provision for your maintenance." On the death of Nensey peeroo, the defendants declined to pay Mr. Peeroo's son any further maintenance. The court held that the obligation of the defendants to maintain the plaintiff did not extend beyond the life of Nensey Peeroo.

***Husenbhoy v. Ahmedabhoy* (1902) 4 Bombay Law Reporter 336-340.**

Husenbhoy Ahmedbhoy (plaintiff) v. Ahmedabhoy Habibbhoy (defendant)

Date: 15 June 1901

Judge: Mr. Justice Starling, on appeal before Sir Lawrence Jenkins, Knight, Chief Justice and Mr. Justice Russell

Counsel: Basil Scott, Advocate General, for plaintiff, Husenbhoy Ahmedbhoy
Branson for defendant, Ahmedbhoy Habibbhoy
Tyabji, Dayabhai & Co., for plaintiff, in the appeal
Ardeshir, Hormusji, Dinshaw & Co., for the defendant, in the appeal

Court: Original Civil, Suit No. 224 of 1901.

ISSUES: Will - Testatrix - Legatee - Bequest taking effect when legatee acquires 25 years - Void condition.

Judgement: The court held that the plaintiff, having attained the age of twenty-one and thus being three years past his majority, was entitled to have the property of the testatrix handed over to him although his enjoyment of it was by her will to be postponed till he was twenty-five, unless in the meantime the income was clearly disposed in favour of someone else. No questions as to the testatrix's absolute right to the property raised.

***Mawjibhai v. Muljibhoy* (1902) 4 Bombay Law Reporter 199-204.**

Mawjibhai Herjee and others (plaintiffs) v. Muljibhoy Rahimbhai (defendant)

Date: 25 February 1902

Judge: Mr. Justice Chandavarkar

Counsel: Basil Scott, Advocate General, Davar and Raikes for original plaintiff.
Lowndes with Inverarity for original defendants.
Tyabji and Co. for the plaintiffs, in the appeal
Edgelow Gulabchand and Wadia for the defendant, in the appeal.

Court: Suit No. 599 of 1901

ISSUES: Will - Trust - Feast to relations - Discretion of trustees as to expenditure - Court's jurisdiction to interfere.

Judgement: A testatrix directed by her will a number of charitable and other activities. The plaintiffs objected that the testatrix could not have intended that the trustees were at liberty to spend the income of the trust properties without any limit; and that, therefore, the Court should fix some limit as to the annual expenditure. The court held that the testatrix had reposed in the trustees a discretion in the matter; and so long as that discretion was properly and honestly exercised, the Court could not fetter it by fixing a limit to their expenditure. No questions as to the testatrix's right to inherit the property or to dispose of it without restriction, beyond the point, were raised.

***Advocate General v. Karmally* (1902) 4 Bombay Law Reporter 857-868.**

Advocate General of Bombay (appellant) v. Karmally Rahimbhoy and others (respondent)

Date: 17 October 1902

Judge: Sir Lawrence Jenkins, Chief Justice, and Mr. Justice Russell

Counsel: Basil Scott (Advocate General) and Bailey for Appellant
Lowndes and Mr. Jardine for 2nd and 3rd Respondents
Young for Fulbai
Kirkpatrick and Raikes for executors

Court: Original Civil, Appeal No. 1226

ISSUES: Practice - Civil - Administration suit - Further directions - Advocate General added as a party - Advocate General entitled to raise a point as to the validity of the gift - Account and enquiries - Beneficiary - Trustee.

Judgement: The Advocate General raised the contention that the gift to Lilbai's children (an annuity of Rs. 1,000 per month per child) was bad as it transgressed the rule in the Tagore case and the gift, therefore, lapsed into the residuary gift. Contention considered and the case was remitted. The court found that the executors by allowing such large sums to be paid in respect of a legacy which the Advocate General at their instance contended was wholly or partially invalid may have laid themselves open to a charge of *devastavit*.

***Ahmedbhai v. Framji* (1903) 5 Bombay Law Reporter 940-945.**

Ahmedbhai Habibbhai (defendants) APPELLANTS v. Framji Edulji Bamboat (plaintiff) RESPONDENT

Date: 29 September 1903

Judge: Mr. Justice Chandavarkar and Mr. Justice Jacob

Counsel: D. A. Khare with M. B. Chaubal and N. M. Samarth for the appellants
H. C. Coyajee for the respondent

Court: First appeal No. 37 of 1903, from the decision of A. G. Bhawe, Esq., First Class Subordinate Judge of Sholapur, in Civil suit No. 173 of 1900.

ISSUES: Malicious prosecution - Firm and partner - Managing partner - Liability of the firm - Indictment containing several charges - No reasonable cause for some of the charges - Reasonable and probable cause - Mere circumstances of suspicion - Prosecution - Commencement of prosecution.

Judgement: Dispute over a commercial partnership involving Khojas.

***Advocate General v. Karmally* (1904) 6 Bombay Law Reporter 601-611.**

Advocate General of Bombay (appellant) v. Karmally Rahimbhoy and others (respondent)

Date: 13 November 1903

Judge: Sir Lawrence Jenkins, Chief Justice, and Mr. Justice Russell

Counsel: Basil Scott, Advocate General, and Bailey for Appellant

Respondent 1, Karmally Rahimbhoy, in person

Lowndes and Mr. Jardine for respondents 2 and 3

Raikes and Setalvad for respondent 4

Raikes and Jinnah for respondents 5 and 6

Messrs Craigie, Lynch and Owen attorneys for the appellant, Advocate General, in the appeal

Messrs Wadia, Gandhi & Co. and Messrs Thakurdas & Co. for the respondent, Karmali, in the appeal

Court: Original Civil, Appeal No. 1226

ISSUES: Will - Gift to a class - Khoja Mahomedans.

Judgement: Where a Bombay Khoja testator made a will whereby he left an annuity to his daughter, and after her death, to her children, the bequest enures to the benefit of such of her children as were in existence at the death of the testator. The court held that the annuity, though not valid in its entirety, was applicable to all the children (although the daughter was not specified) out of special consideration of the fact that all previous litigation presumed that all children benefited.

***Macleod v. Kisson* (1904) 6 Bombay Law Reporter 995-1013.**

N. C. Macleod PLAINTIFF v. Kisson Vithalsingjee & Dwarkadas Dharamsey DEFENDANTS

Date: 10 September 1904.

Judge: Justice Chadavarkar

Counsel: Basil Scott (Advocate General) with Mr. Lowndes for the plaintiff, N. C. Macleod

Mr. Kirkpatrick and Mr. Lowndes for defendant 1, Kisson Vithalsingjee

Defendant 2, Dwarkadas Dharamsey, present in person

Court: Original Suit No. 177 of 1904

ISSUES: Practice - Receiver - Suit in ejectment by Receiver under authority from Court - Decree binding upon the real party ascertained - Civil Procedure Code (Act XIV of 1882), Sec. 372 - Devolution of interest - Interpretation - Misjoinder of parties - Transfer of Property Act (IV of 1882), Sec. 8, 70 - Accretions to the mortgaged property - Mortgagor building a new house on the land mortgaged - Mortgage entitled to include the new house in his security - Deed - Appurtenances - Construction - Lease containing a covenant for renewal - Covenant running with the land - Lease from the mortgagor in possession - Mortgage's right against the mortgagor and lessee.

Judgement: Somjee Parpia, a Khoja merchant of Bombay, died in 1885, survived by four sons by his first wife, deceased, and four sons by his second wife, Labai. By his will, Somjee gave the whole of his moveable and immoveable properties to his four sons by his first wife, and directed them to give out of those properties to Labai and her four sons Rs. 30,000 within six years from the date of his death. Somjee's four sons by his first wife mortgaged to the Bank of Bombay certain immoveable properties on the 12th of January 1899 by a deed (Ex. A). The bank having, under the power of sale reserved to them by that deed, advertised the properties for sale, the four sons of Somjee by

his second wife, Labai (who had died by this time), gave notice of the charge in their favour for Rs. 30,000 and claimed that the properties should be sold subject to that charge. The Bank having denied the charge and set up their right of priority in favour of their mortgage, Labai's sons brought suit No. 554 of 1903 against the four sons of Somjee by his first wife, and the Bank of Bombay. After that suit had been filed, the Bank assigned the mortgage to Dwarkadas Dharamse, the second plaintiff in the present suit, on the 14th January 1904 (vide Ex. B). The court found that although the second plaintiff was a "mere tool in the hands of his creditor Ahmedbhoy Habibhoy," the assignment of the mortgage had to be held to be valid.

***Rashid v. Sherbanoo* (1904) 6 Bombay Law Reporter 874-879.**

Rashid Karmali and Ismail Karmali (defendants) APPELLANTS v. Sherbanoo (plaintiff) RESPONDENT

Date: 15 September 1904.

Judge: Justice Russell and Mr. Justice Chadavarkar

Counsel: S. V. Bhandakar and Mr. M. M. Karbhari for the appellants, Rashid and Ismail Karmali
No representation for the plaintiff, Sherbanoo

Court: First appeal No. 54 of 1904, from the decision of Skinner Turner, Esq., Assistant Judge of His Britannic Majesty's Court at Zanzibar, in civil suit No. 336 of 1903.

ISSUES: Khoja Mahomedans - Hindu Law - Succession and inheritance - Maintenance of widow - Joint brother's entitled to succeed.

Judgement: Although a Khoja may be married according to Muslim rites, yet at the moment of his death so far as regards the succession to his property he was considered a Hindu. The living Muslim, by operation of law, became a dead Hindu. If he had any brothers living joint with him, his wife would on his death be entitled to maintenance out of his estate while his property devolved on them.

***Khaver Sultan v. Rukha Sultan* (1904) 6 Bombay Law Reporter 983-995.**

Bibi Khaver Sultan, daughter of Bibi Begam Jan, plaintiff, v. Bibi Rukha Sultan, widow of Aga Mahomed Mirza, son of Bibi Begam Jan, and her minor children, defendants

Date: 29 September 1904

Judge: Justice Chadavarkar

Counsel: Mr. Jinnah, with Mr. C. H. Setalvad, for the plaintiff, Bivi Khavar Sultan
Mr. Basil Scott (Advocate General), for defendant 1, Bivi Rukha Sultan
Mr. Robertson for defendants 2 to 5, minor children of defendant 1

Court: Original Civil. Suit No. 51 of 1904

ISSUES: Evidence Act (I of 1872), Sec. 11 - Collateral fact - Relevancy - Collector's books - Mahomedan law - Gift - Possession

H.H. Aga Khan involved in the case. Appeared to be a family/entourage matter, not Khoja case.

***Moosabhai v. Yacoobhai* (1904) 29 Indian Law Reports, Bombay Series 267-284.**

Moosabhoy v. Yakubhai (1905) 7 Bombay Law Reporter 45 - 56.

Moosabhoy Mahomed Sajan and his wife Kajbai, plaintiffs v. Yakubhai Mahomed Sajan, Gulamalli Mahomed Sajan, Phoolbai, wife of Yakubhai Mahomed Sajan, and Mr. Maclead, Official Assignee of the estate, defendants

Date: 12 November 1904

Judge: Justice Tyabji.

Counsel: Setalvad (with H. Tyabji) for plaintiffs
Scott (Advocate General) with Lowndes and Bahadurji for Defendant 1,
Davar (with Bhandarkar) for Defendants 2 and 4
Defendant 3 did not appear

Court: Original Civil Suit No. 509 of 1903

ISSUES: Mahomedan Law - Trust - Will - Reference to trust deed in will for the purpose of confirming it - Testamentary document - Trustee *de son tort* - Express Trustee - Liability to account - Limitation Act (XV of 1877), section 10.

Judgement: Under Muslim law, possession was as necessary in the case of trusts as in the case of gifts -- not

necessarily direct possession of the premises, but the best possession of which the property was capable at the time, either actual, symbolic or constructive. There a trust deed was referred to in a will with a view of confirming it, it was confirmed and became part of the will. If express trust were created by deed or will and some third party took upon himself the administration of the trust property, he becomes a trustee *de son tort* and, as such was bound to account as if he were the rightful trustee and limitation cannot run in his favour under section 10 of the Limitation Act (XV of 1877). The court held that the will provided full shares for all sons and half shares of the estate for daughters and daughters-in-law. The will also had also given inheritance rights to the predeceased widow on par with male rights.

***Goolam Hoosein v. Bank of Bombay. Sooleman v. Rahimtulla* (1905) 7 Bombay Law Reporter 411-421.**

Goolam Hoosein Somji etc., appellants, v. Bank of Bombay and another, respondents. Sooleman Somji etc., appellants v. Rahimtulla Somji etc., respondents

Date: 20 February 1905

Judge: Lawrence Jenkins, K.C.I.E., Chief Justice and Mr. Justice Batty

Court: Appeal from Original Civil (O.C.J. appeal No. 1370, from the decision of Chandavarkar J., in original suit No. 554 of 1903)

ISSUES: Will - Executors - Powers to dispose of property - Rights of creditors of legatees - Executors applying testator's property for their own private purposes - Mortgage by an executor who is also a residuary legatee - Residuary legatee - Mortgage from an executor who is a residuary legatee, claims as between.

Judgement: Further consideration of legal matters involved in the *Macleod v. Kisson* case, noted above.

***Bibi Kaver Sultan v. Bibi Rukha Sultan* (1905) 7 Bombay Law Reporter 443-446.**

Bibi Kaver Sultan v. Bibi Rukha Sultan

Date: 4 April 1905.

Judge: Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty

Court: Appeal from Original Civil (Appeal No. 1379, from the decision of Chadavarkar J. in original suit No. 51 of 1904)

ISSUES: Mahomedan Law - Gift - Transfer of possession - Property in possession of tenants - Attornment.

Judgement: H.H. Aga Khan involved in case, both as witness to the execution of a deed and regarding customs of the disputants. Parties to the suit were likely part of the Aga Khan's entourage, not Khojas.

***Meherally v. Sakerkhanoobai* (1905) 7 Bombay Law Reporter 602-610.**

Meherally Mooraj, plaintiff, v. Sakerkhanoobai, defendant

Date: 18 July 1905.

Judge: Justice Batchelor

Counsel: Mr. Jinnah and Mr. F. S. Talyarkhan for the plaintiff
Mr. Ghamat and Mr. Jaffer Raimtoola for the defendant

Court: Original Civil (O.C.J. Suit No. 76 of 1905)

ISSUES: Public policy - Husband and wife - Agreement for future separation - Void agreement - Estoppel.

Judgement: The law looks askance at agreements contemplating the future separation of husband and wife as against the principle of the permanence of the marriage tie. Therefore, an agreement, between a husband and wife providing for an immediate reunion coupled with a provision for subsequent separation is bad under English and Muslim law. The decision overturned a compromise agreement negotiated by the *jama'at* and ordered restitution of conjugal rights. The husband was ordered to pay the wife's dower as it recognized that a Muslim woman had a right to payment of her dower on demand. The court chose to exercise this right so that out of the wife's dower her, and half her husband's, legal costs could be covered.

***Bhau v. Ahmedbhoy* (1906) 8 Bombay Law Reporter 312-323.**

Bhau Mangesh Wagle, applicant, v. Ahmedbhoy Habibbhoy, opponent

Date: 20 Feb. 1906.

Judge: Justice Russell and Justice Aston

Court: Civil Extraordinary Application No. 289 of 1905, from the decision of G. Dabholkar, Esq., Mamlatdar of Bandora in Possessory Suit No. 25 of 1905.
ISSUES: Mamlatdar's Courts Act (Bom. Act III of 1876), Sec. 4, 15 - Injunction - Jurisdiction to grant injunction when the issues are framed under s. 15 (a).
Judgement: Land dispute involving a Khoja.

***Mahomedbhai v. Fatmabai* (1906) 8 Bombay Law Reporter 615-623.**

Mahomedbhai Nensey, defendant, v. Fatmabai, plaintiff.

Date: 30 July 1906.

Judge: Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman

Court: Appeal No. 1428, from the decision of Batchelor J. in Original Suit No. 622 of 1905

ISSUES: Will - Construction - gift over.

Judgement: Fatmabai sued Mahomedbhai Nensey for recovery and continued payment of maintenance, as stipulated in her father-in-laws will. She also claimed her right to inherit the share of the estate as heiress of her son. [The share had devolved upon her husband, and on his death, to his son.] The court ruled in her favour on both counts. It also upheld the rights of Fatmabai's daughter to her education and a portion of mother's share of the estate. The case did not explicitly refer to the application of Hindu law to the Khojas in matters of succession and inheritance. No precedent was set by this remarkable decision.

***Emperor v. Rashid* (1907) 9 Bombay Law Reporter 212-222.**

Emperor v. Rashid Karmalli

Date: 10 January 1907

Judge: Justice Batty and Mr. Justice Heaton

Court: Criminal Appeals Nos. 150 and 151 of 1906, from convictions and sentences passed by Lindsey Smith, Esq., Judge, His Britannic Majesty's Court for Zanzibar

ISSUES: Criminal Procedure Code (Act V of 1898), Sec. 190, 195, 478 - Indian Penal Code (Act XLV of 1860), Sec 193 - Witness - False deposition - Prosecution for perjury - Deposition taken before the Assistant Judge - Trial for perjury by the same officer as District Magistrate - Sanction - Practice - Evidence - Original trial.

Judgement: Rashid Karmali, and his brother Ismail Karmali, were convicted of instigating witnesses to give false evidence for the purpose of establishing in a pending suit that their predeceased brother, Naser Karmali, had divorced his wife Sherbanoo, who claim to maintenance was in litigation.

***Rashid v. Sherbanoo*(1907) 9 Bombay Law Reporter 252-254.**

Rashid Karmalli v. Sherbanoo

Date: 23 January 1907

Judge: Justice Batty and Mr. Justice Pratt

Court: Appellate Civil (Appeal NO. 54 of 1904 from the decision of Skinner Turner, Esq., Assistant Judge of His Britannic Majesty's Court at Zanzibar in Civil Suit No. 336 of 1903)

ISSUES: Mahomedan law - Divorce - *Talak* - *Murz-ul-maut*, Death illness

Judgement: The court found that due to a state of *Murz-ul-maut*, Naser Karmali's alleged divorce of his wife, Sherbanoo was not binding, and Sherbanoo's suit for maintenance was granted.

***In re Indian Arbitration Act Re Atlas Insurance Co.* (1908) 10 Bombay Law Reporter 351-365.**

In re Indian Arbitration Act. Re Atlas Insurance Co. and Ahmedbhoy Hubibbhoy

Date: 23 January 1908

Judge: Justice Davar

Court: Original Civil

ISSUES: Indian Arbitration Act (IX of 1899), Secs. 5, 10 - Leave to revoke submission to arbitration - Motion to be in Court - Practice - Stating a case by arbitrators in Court for opinion - Questions as to admissibility of evidence should be decided in their very inception.

Judgement: Commercial dispute involving Khojas.

***Haji Bibi v. H. H. Sir Sultan Mahomed* (1908) 10 Bombay Law Reporter 327-330.**

Date: February 24, 1908

Judge: Mr. Justice Russell

Court: Original Suit No. 729 of 1905

ISSUES: Practice - Right to begin - Defendants supporting plaintiff must begin before defendants opposing him - Plaintiff, meaning of - Civil Procedure Code (Act XIV of 1882), Secs. 26, 179, 180 - Judicature Act (1873), Sec 100.

Judgement: The court ruled that the facts presented were not material for the purposes of the suit under consideration in *Haji Bibi v. Aga Khan*, noted below.

***Esmail Ebrahim v. Haji Jan Mahomed* (1908) 10 Bombay Law Reporter 1172.**

Date: 16 November 1908

Judge: Hon. Mr. Basil Scott, Chief Justice and Mr. Justice Batchelor

Court: Appeal from Original Civil [Appeal No. 43 and 44 of 1908 from Suit No. 256 of 1907]

ISSUES: Civil Procedure Code (Act XIV of 1882), Sec., 102, 103, and 117 - Suit, dismissal of, for absence of counsel - Counsel not able to appear - Return of brief by junior to counsel - Practice.

Judgement: Litigation over counsel involving Khoja disputants. Primary dispute not explained.

***Ahmedbhoy Habibhoy v. Sir Dinshaw M. Petit* (1909) 11 Bombay Law Reporter 366-372.**

Date: 25 February 1909

Judge: Justice Beaman

Counsel: Messrs. Thakurdas & Co. for plaintiff
Messrs. Pestonji Rustim & Kola for defendants 1 & 2
Messrs. Shroff, Dinshaw & Dharamsi for defendants 3 & 7

Court: O.C.J. (Original Civil J?), Suit No. 756 of 1907

ISSUES: Civil Procedure Code (Act V of 1908), Sec. 11 - *Res judicata*- Decision not necessary for the suit - Test of *res judicata* - Finality of judgement

Judgement: Litigation of a deceased Khoja woman's intention to sell a piece of land. Intent held as valid.

***Haji Bibi v. H. H. Sir Sultan Mahomed Shah, The Aga Khan* (1909) 11 Bombay Law Reporter 409.**

Judge: Russell

Court: Original Civil Suit No. 729 of 1905

Counsel: Bahadurji, Setalvad and Dessai for the plaintiff
Inverity, Lowndes and Raikes, for His Highness the Aga Khan
Scott, Strangman subsequently Branson & Jinnah for Shamsudin Shah
Bahadurji and Desai for defendant 2
Robertson and Jardine for defendant 3
Branson and Viccaji and subsequently Jaffer Rahimtulla for defendants 4 and 6
Padsha and Lalkaka for defendants 7 and 8
Setalvad, with Davar and Desai for defendants 9 and 14

ISSUES: The Aga Khan has absolute property over the offerings made to him - Members of the Aga Khan's family not jointly entitled to such offerings - Succession to the estate of the Aga Khan is not joint - Khoja are Shiah Imami Ismailis and not Asnasharis - History of the Aga Khan family - History of Shia Imami Ismailis - Judge entitled to exclude the public from the court or to let the evidence likely to arouse religious or political disquietude be published.

Judgement: The court ruled that the Aga Khan had absolute and sole ownership of all offerings made to him and members of his family were not jointly entitled to such offerings.

***Ahmedbhoy Habibhoy v. Sir Dinshaw M. Petit* (1909) 11 Bombay Law Reporter 545-606.**

Date: 14 June 1909

Judge: Justice Beaman

Court: Original Civil, Suit No. 756 of 1907

ISSUES: Vendor and purchaser - Specific performance for contract of sale of land - Title is doubtful if third parties claim an interest in land - Discretionary power of Court - Only parties to the contract can be parties to the suit - Title by the head of a joint Hindu family is doubtful without the concurrence of all co-parceners.

Judgement: Further litigation involving the sale of a deceased Khoja woman's piece of land.

***Emperor v. Gulam Hoosein* (1909) 11 Bombay Law Reporter 849-885.**

Emperor v. Gulam Hoosein Ratonsey Nanji

Date: 27 July 1909

Judge: Sir Scott Basil, Kt., Chief Justice, and Mr. Justice Batchelor

Court: Criminal Appeal No. 217 of 1909

ISSUES: Penal Code (Act XLV of 1860), Sec. 141 - Unlawful assembly.

Judgement: Clause 4 to s. 141 of the Indian Penal Code 1860 was meant to prevent the resort to force in vindication of supposed rights. It made a distinction between an admitted claim or an ascertained right and a disputed claim. Magistrates in doing their duty should have regard to, and make themselves acquainted with, the character of the population amongst whom they have to administer justice. The dispute was a violent clash (Aga Khani vs. Ithna 'Ashari Khojas) over the property of a Khoja Shi'a Ithna 'Ashari mosque.

***Sir Currimbhoy Ebrahim v. Municipal Commissioner* (1909) 11 Bombay Law Reporter 1167-1172.**

Sir Currimbhoy Ebrahim v. The Municipal Commissioner of Bombay

Date: 23 September 1909

Judge: Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor

Court: Suit No. 709 of 1909

ISSUES: City of Bombay Municipal Act (Bom. Act III of 19888), Sec. 251A (a) - Water-closets - Building - Construction - "Directly over under of directly below".

Judgement: A Khoja business man's noncompliance with the Municipal Act.

***Cassamally Jairajbhai Peerbhai v. Sir Currimbhoy Ebrahim* (1911) 36 Indian Law Reports, Bombay Series 214-267.**

Cassamally Jairajbhai Peerbhai (plaintiff) v. Sir Currimbhoy Ebrahim and others (Defendants)

Date: 10 March 1911

Judge: Justice Beaman

Counsel: Inverarity, Raikes and Lowndes for the plaintiff, Cassamally Jairajbhai Peerbhai Bahadurji and Vakil for defendants 1 - 4

Baptista and Kajiji for defendant 5

Strangman, (Advocate General) and Wadia for defendant 6

Setalvad and Desai for defendant 7

Jinnah and Jayakar for defendant 8

Bahadurji and Coyaji for defendants 9 - 10

Davar and Mulla for defendants 11 - 12

Sayani and Tyabji for defendants 13, 17, 18

Sayani and Jaffer for defendants 14, 15, 16

Court: Original Civil Suit No. 659 of 1909.

ISSUES: Khoja Mahomedan - Settlement - Settlor himself Trustee - No delivery of possession - Son born after Settlement - Power of Settlor to revoke settlement - Settlor's intention not carried out owing to settlor's death - Power of Court to aid defective execution - Suit by after born son to set aside settlement - Limitation Act (IX of 1908), section 10 - Resulting trust back to settlor - Adverse possession - Difference between *estoppel* and *res judicata* - Validity of Wakf contained in deed containing other gifts - Local usage cannot override Mahomedan Law - Registration - Vis Major.

Judgement: Litigation between Khoja men over a trust. Local usage or alleged custom denied, application of Muslim law enforced. Cursory mention of Khoja women: marriage revoked a will; annuities to ladies in the trust deed were valid.

***Hassonally v. Popatlal* (1912) 37 Indian Law Reports, Bombay Series 211-216.**

Date: 25 June 1912

Judge: Justice Beaman

Counsel: Taleyarkhan with Kanga for the plaintiff, Hassonally Moledina
Shortt with Davar for the defendant Popatlal Parbhudas

Court: Original Suit (Suit No. 944 of 1911)

ISSUES: Doctrine of satisfaction - Inapplicability in India of doctrine of satisfaction - Indian Succession Act (X of 1865), section 164 - General applicability in India of the principles of the Indian Succession Act in so far as they are not overridden by some special provision of local law or usage - Khojas - Law applicable to Khoja wills - The Indian Evidence Act (I of 1872), section 92.

Judgement: The court decided that Khoja Muslims were not governed by the Indian Succession Act. Interpretation of Khoja wills were, therefore, in accordance with the provisions of the general law of evidence, not Hindu law.

***Ahmedbhai Habibbhai v. The Bombay Fire and Marine Insurance Co. Ltd.* (1913) 15 Bombay Law Reporter 19-26.**

Date: 1 & 26 November 1912

Judge: Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali

Court: On appeal from the High Court of Judicature at Bombay

ISSUES: Fire Insurance - Policy - Power of the Company to take and hold possession of the premises damaged by fire - Arbitration - Admission of evidence - Petition to revoke submission to arbitration.

Judgement: Khoja businessman sued for damages.

***Jan Mahomed v. Datu* (1913) 38 Indian Law Reports, Bombay Series 462-466.**

Date: August 1913

Judge: Judge Beaman

Counsel: Bhandarkar and Vaidya for the plaintiffs, Jan Mahomed Abdulla Datu
Mirza and Khan for 1st defendant, Datu jaffer
Wadia, with Strangman, for 2nd defendant
B. Wadia and Modi for 3rd defendant

Court: Original Suit No. 1021 of 1912

ISSUES: Khojas - Hindu Law, how far applicable to Khojas - Joint family - Presumption as to membership of joint family - Mahomedan law - Spec successionist, transfer of - Family arrangements in the nature of a partition, reasonableness of - Limitation Act (IX of 1908), Article 91 and 127.

Judgement: The application of Hindu law to the Khojas in disputes over joint family property denied.

***Ahmedbhoy v. Waman* (1913) 15 Bombay Law Reporter 72-74.**

Ahmedbhoy Habibbhoy v. Waman Dhondu

Date: 18 November 1913

Judge: Sir Basil Scott, Kt., Chief Justice and mR. Justice Batchelor

Court: Second Appeal No. 565 of 1911, from the decision of C. E. Palmer, District Judge of Thana, in Appeal No. 129 of 9109, confirming the decree passed by A. W. Varley, Assistant Judge of Thana, in Reference No. 9 of 1907.

ISSUES: Land Acquisiting Act (I of 1894), Sec. 54 - Civil Procedure Code (Act V of 1908), Sec. 96 (1) - Bombay Civil Courts Act (XIV of 1869), Sec. 16 - Reference in case where the award does not exceed Rs. 5000 - Decision by Assistant Judge - Appeal to District Court - Second appeal to High Court not allowed.

Judgement: Dispute over compensation, involving a Khoja businessman.

***Karmalli Abdulla v. Vora Karimji* (1915) 17 Bombay Law Reporter 103-114.**

Karmali Abdulla Allarkhia v. Vora [Bohra] Karmji

Date: November 1914

Judge: Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali

Court: On appeal from the High Court of Judicature at Bombay

ISSUES: Partnership - Joint adventure - Dealing by an individual - Liability of firm
Judgement: Commercial dispute between Khoja and Bohra businessmen.

***Laxmibai v. Husainbhai* (1916) 18 Bombay Law Reporter 798-802.**

Laxmibai v. Husainbhai Ahmedbhai

Date: 22 August 1916

Judge: Justice Macleod

Court: Motion in Original Civil Suit No. 347 of 1912

ISSUES: Commissioner - Taking of accounts - Power to decide questions of law - Court's jurisdiction to decide the questions - High Court Rules (Original Side) Rules 897, 899.

Judgement: Commercial property dispute involving Khojas.

***Abdul Karim v. Karmali* (1920) 20 Bombay Law Reporter 708-711.**

Abdul Karim v. Karmali Rahimtulla

Date: 19 March 1920

Judge: Justice Crump

Court: Original Civil Suit No. 3639 of 1919

ISSUES: Hindu Wills Act (XXI of 1870) - Non-applicability to Khojas - Indian Succession Act (X of 1865), Sec. 187 not applicable to Khojas - Will is a document of title

Judgement: A Khoja lady, Miriambai, agreed to sell land to the plaintiffs. The defendant, her son. The court held that the Hindu Wills Act and Indian Succession Act were not applicable to the Khojas. The title under the will was established without probate, and stood on the same footing as any other document of title. The judgement clarified that a Khoja was not a 'Hindu' within the meaning of the Hindu Wills Act.

***Fida Husein V. Bai Monghibai* (1936) 38 Bombay Law Reporter 397.**

Date: 11 October 1935

Judge: Justice Chitre

Court: Original Civil Suit No. 1421 of 1933

ISSUES: Khoja - Wills - Dispose of whole property - Hindu law

Judgement: A Khoja may dispose of the whole of his property by will, as per Hindu testamentary powers.

***Ashrafalli Cassamalli v. Mahomedalli Rajaballi* (1945) 48 Bombay Law Reporter 642-654.**

Date: 1945

Judge: Mr. Justice Chagla

Counsel: Sir Jamshedji Kama, with Murzban J. Mistree, for the plaintiff

M. V. Desai, with S. T. Desai, for defendants Nos 1 and 2

M. Y. Hainday, with A. A. Peerbhoy, for defendant No. 3

S. R. Tendolkar, with H. G. Mahimtura, for defendant No. 5

V. F. Taraporewalla, with S. D. Vimadalal, for defendant No. 6

K. M. Munshi, with M. P. Amin, for defendants No. 7 to 10

M. L. Manecksha, with D. E. Bilimoria, for defendant No. 11

D. E. Bilimoria, for defendant No. 12

C. K. Daphtary, Ad Gen, with S. A. Desai, for defendant No. 13

C. K. Daphtary, Ad Gen, with N. Kazi, for defendants Nos 14 and 15

ISSUES: Khoja - Will - Law applicable to Khoja's will - Shariat Act (XXVI of 1937) -- Validity of trusts and *wakfs* created by a Khoja's will - Whether construed according to Mahomedan law - Residuary clause in will, construction of - Bequest - Revocation by addition to bequest of property.

Judgement: The making and revocation of Khoja wills and the validity of trusts and *wakfs* created thereby were all governed by Muslim law, but apart from trusts and *wakfs*, the construction of a Khoja will was still governed by Hindu Law.

***Begum Noorbanu v. Deputy Custodian General of Evacuee Property* (1965) 1937, v. 52 c. 332 All India Reports, Supreme Court 13-19.**

Begum Noorbanu and others, Appellants v. Deputy Custodian General of Evacuee Property, Respondent

Date: 7 May 1965

Judge: Before K. N. Wanchoo, J. C. Shah and J. R. Mudholkar, JJ.

Court: Civil Appeal No. 164 of 1963. From Deputy Custodian General, India.

ISSUES and judgement:

- (a) Administration of Evacuee Property Act (1950) Ss. 7, 7A and 8 - Object of notice under S. 7 - Person declared evacuee - Notice to him under S. 7 not necessary - Persons who have not migrated to Pakistan and who claim interest in evacuee property are only entitled to notice - Objection as to want of notice - Who can take.
- (b) Administration of Evacuee Property Act (1950) S. 7 - Contents of notice - Need not specify ground - Properties to be sufficiently described.
- (c) Hindu law - Custom - Khojas of former Hyderabad State - If governed by Hindu law or Muhammadan law in matters of succession and inheritance - Custom at variance with Muhammadan law cannot be pleaded.

***Noorbanu v. Dep. Custodian General, E.P.* (1965) 52 All-India Reporter, Supreme Court 1937.**

AIR 1965 Supreme Court 1937 (V. 52 C 332) and Sec. 17 *supra*..

Begum Noorbanu and others, Appellants v. Deputy Custodian General of Evacuee Property, Respondent.

Date: 7th May 1965.

Judge: K. N. Wanchoo, J. C. Shah and J. R. Mudholkar, JJ.

Court: Civil Appeal No. 164 of 1963.

ISSUES and judgement:

- (a) Administration of Evacuee Property Act (1950) Ss. 7, 7a and 8 - Object of notice under S. 7 - Person declared evacuee - Notice to him under S. 7 not necessary - Persons who have not migrated to Pakistan and who claim interest in evacuee property are only entitled to notice - Objection as to want of notice - Who can Take.
- (b) Administration of Evacuee Property Act (1950) S. 7 - Contents of notice - Need not specify grounds - Properties to be sufficiently described.
- (c) Hindu Law - Custom - Khojas of former Hyderabad State - If governed by Hindu law or Muhammadan law in matters of succession and inheritance - Custom at variance with Muhammadan law cannot be pleaded.

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Bhau v. Ahmedbhoy (1906) 8 Bombay Law Reporter 312.
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